92-1524

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JAMES B. DAVIS,

Petitioner,

v.

THE FIRST NATIONAL BANK OF KILLEEN, TEXAS,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. MAY THE COURT OF APPEALS, WITHOUT EXCEEDING ITS AUTHORITY, COMMITTING ERROR, OR VIOLATING THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OR SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, EXCUSE A DEFENDANT'S FAILURE TO RENEW AT THE CLOSE OF ALL EVIDENCE ITS MOTION FOR JUDGMENT AS A MATTER OF LAW MADE AT THE CLOSE OF THE PLAINTIFF'S CASE-IN-CHIEF?

2. WHERE AN ISSUE RAISED ON APPEAL WAS NOT PROPERLY PRESERVED BY FIRST BEING SPECIFIED AS A GROUND FOR A PRE-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW, ALTHOUGH LATER ASSERTED AS A GROUND IN A POST-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE FOR A NEW TRIAL, MAY THE COURT OF APPEALS, WITHOUT EXCEEDING ITS AUTHORITY OR COMMITTING ERROR, REVIEW THE SUFFICIENCY OF THE EVIDENCE ON THAT UNPRESERVED ISSUE AND REVERSE AND RENDER JUDGMENT THEREON WHERE THE JURY VERDICT WAS NOT THE PRODUCT OF PLAIN ERROR AMOUNTING TO A MISCARRIAGE OF JUSTICE?

3. MAY THE COURT OF APPEALS, WITHOUT EXCEEDING ITS AUTHORITY OR COMMITTING ERROR, FAIL TO APPLY THE "PLAIN ERROR" STANDARD OF REVIEW REGARDING A SUFFICIENCY OF THE EVIDENCE ISSUE NOT PRESERVED FOR APPEAL?

QUESTIONS PRESENTED – Continued

4. MAY THE COURT OF APPEALS REWEIGH THE EVIDENCE AND CREDIBILITY OF THE WITNESSES IN ORDER TO REVERSE THE JURY VERDICT AND RENDER JUDGMENT WITHOUT VIOLATING THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

5. MAY THE COURT OF APPEALS, WITHOUT EXCEEDING ITS AUTHORITY, COMMITTING ERROR, OR VIOLATING THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OR THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, INFER A GROUND NOT SPECIFIED IN A PRE-VERDICT MOTION FOR JUDGMENT AS A MATTER OF LAW AND THEREAFTER REVERSE THE JURY VERDICT AND RENDER JUDGMENT ON APPEAL UPON THAT INFERRED GROUND?

LIST OF ALL PARTIES

James B. Davis, Petitioner

The First National Bank of Killeen, Texas, Respondent

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REPORTS DELIVERED BELOW

The decision of the United States Court of Appeals for the Fifth Circuit was reported as follows:

James B. Davis, Plaintiff-Appellee/Cross-Appellant v. The First National Bank of Killeen, Texas, Defendant-Appellant/Cross-Appellee, 976 F.2d 944, (5th Cir. 1992)

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals sought to be reviewed was entered November 9, 1992. Petitioner timely filed his Petition for Rehearing and a Petition for Rehearing En Banc in the court below, which Petition for Rehearing was denied January 5, 1993. This Court has discretionary jurisdiction over this cause by virtue of 28 U.S.C. §1254(1). This cause also involves a federal question under the Age Discrimination in Employment Act 29 U.S.C. §621, *et seq.*, as well as the Fifth and Seventh Amendments to the United States Constitution.

PROVISIONS INVOLVED IN THIS CASE

The following provisions are cited herein and the pertinent texts included in the Appendix.

a. *Constitutional Provisions.* Fifth and Seventh Amendments to the United States Constitution. (App. 62)

b. *Statutory Provisions.* 29 U.S.C. §623(a) (App. 62)

c. *Federal Rules of Civil Procedure.*

1. Rule 50 (1987 version) (App. 63)

2. Rule 50 (1991 version) (App. 66)

STATEMENT OF THE CASE

A. Course of the Proceedings.

This case was brought by James B. Davis against the First National Bank of Killeen, Texas, pursuant to the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* On October 25 and 26, 1990, this matter was tried before a jury and the Honorable Walter S. Smith, Jr., of the United States District Court for the Western District of Texas, Waco Division, on the issues of discriminatory demotion, constructive discharge and age discrimination. At the conclusion of Davis' case-in-chief, the Bank orally moved for a directed verdict under Rule 50(a) asserting (1) the demotion occurred more than 300 days before Davis filed his charge of discrimination and (2) the evidence was insufficient to support a finding of constructive discharge. (App. 82) No other grounds for directed verdict were specified. Davis did not oppose the motion concerning demotion, and the motion as to the issue of constructive discharge was denied. The Bank thereafter called one witness and rested. Davis alone testified in rebuttal. The Bank did not renew its motion for directed verdict at the close of all evidence. At the conclusion of all the evidence, the jury returned a verdict in favor of Davis concluding that the Bank had constructively discharged Davis and that it had willfully violated the Age Discrimination in Employment Act. After entering orders and

judgments on January 2, 1991 (vacated *sua sponte*), January 24, 1991 (App. 17) and September 27, 1991 (App. 21), the trial court entered its final order and judgment on December 2, 1991 (App. 35) that Davis recover back pay of $75,000.00, front pay of $131,880.00, prejudgment interest and attorney's fees, from which the appeals were taken. On February 5, 1991, the Bank filed its Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial urging insufficiency of the evidence as to constructive discharge, but expanding the grounds to now include insufficiency of the evidence of age discrimination. (App. 56)

B. Statement of Facts.[1]

James B. Davis began his employment with the First National Bank of Killeen, Texas in September 1955 and was continuously employed with the Bank for thirty-three (33) years. Davis started in the bookkeeping department and came up through the ranks being promoted in 1968 to Assistant Cashier, to Vice-President in the latter 1970's and to Vice-President in Charge of Commercial and Consumer Loans in 1984 or 1985, the largest department in the Bank. (Tr. 43-44, P. Ex. 1) As Vice-President in Charge of Commercial and Consumer Loans, he supervised two Vice-Presidents, two Assistant Vice-Presidents, one Assistant Cashier, a Loan Processing Supervisor, Loan Collection Supervisor and Loan Administration Supervisor and several secretaries. During this time, he

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[1] As used herein, "Tr." refers to the transcript of trial, "P. Ex." refers to Plaintiff's trial exhibits, and "App." refers to the Appendix accompanying this Petition.

was in charge of commercial loans, consumer loans, the loan processing department, loan collections and loan administration. Davis' position was supervisory. (Tr. 48-49, P. Ex. 2) Until the time following his heart attack, he had never been counseled for poor job performance, placed on probation, or threatened with being placed on probation.

In 1985, First Community BancShares, a Bank holding company, acquired both First National Bank of Killeen and Fort Hood National Bank. (Tr. 343) Prior to this acquisition, Davis was a voting member of the Loan Committee. After the acquisition, he was removed as a voting member of this committee. (Tr. 60).

On July 26, 1987, Davis suffered a heart attack and was away from his employment for five months. (Tr. 61) Although his treating physician indicated in November of 1987 that he could return to half-days of work, Ken Johnson, then President of the First National Bank of Killeen, told Davis to return home, get completely well and come back after the first of the year when he could work full days. (Tr. 62-63) In mid-December of 1987, Davis was requested to come to the Bank and speak with Johnson who advised him that, upon his return to the Bank, he would become the supervisor of the Dealer Department and would be returned with the title of Vice-President and at the same salary. Nothing was said about his being the sole person in the Dealer Department or that his supervisory functions had been removed.

In April or May of 1987, a Task Force was formed to analyze dealer loans for better control and to determine new documents and procedures to secure dealer lines of

credit such as master notes, security agreements and dealer agreements. Prior to his heart attack, the Task Force consisted of Johnson, as President of the Bank, Paul Farmer, Mike Laughlin, and Davis. (Tr. 65-66) Subsequent to his heart attack, Davis was replaced on the Task Force by Steve Mills, an employee of Fort Hood National Bank who was being transferred to the First National Bank of Killeen. Mills was in his thirties. (Tr. 68) Upon his return to the Bank, Davis found that he had been replaced by Mills as the Vice President of the Commercial and Consumer Loan Department. (Tr. 69)

When Davis returned to work at the Bank, he found for the first time that he was the only person in the Dealer Department, with no staff to supervise and no secretary to assist him. Never before his return or after, did anyone discuss with him what his duties, functions or responsibilities would be in the Dealer Department. There had been no discussion or documentation presented to Davis that evidenced any changes in policies or procedures concerning dealer loans or the conduct of business for the Dealer Department. Davis was not presented with a copy of the changes in procedures for dealer loans, nor was he aware of its existence until after he was terminated. (Tr. 69, 76) Davis submitted to Johnson a letter indicating his goals for the Dealer Department, to which he received no response. (P. Ex. 7, Tr. 77)

In pursuing his duties in the Dealer Department, Davis put packages together for the Loan Committee using the same format for each package. The loan package would include financial statements, earning statements, fiscal year end statements, history of accounts

with the Bank, account balances, credit reports and history of performances. (Tr. 84) He was given no assistance or help in putting the packages together for presentation to the loan committee. (Tr. 85) The voting members of the loan committee at that time were Churchill Jones, Ken Johnson, Rick Carlisle, J. C. Walker and Ronnie Radle. (Tr. 86) Davis' difficulty with the Loan Committee centered around Churchill Jones and Ken Johnson who together controlled the Loan Committee and who, for the first time ever, began belittling Davis in front of others at the committee meetings and giving him the clear indication that they were attempting to eliminate dealers by refusing credit. (Tr. 87-90) Rick Carlisle concurred in Davis' conclusions. (Tr. 194-196, 228-229, 237) Yet the criticism of Davis and his loan package presentations were not consistent. Although packaged in the same manner as all other dealer loan submissions, the loan package for Cleo Bay, a prominent Killeen area new car dealer, submitted to the committee by Davis, was approved on first submission without any criticism. (Tr. 92)

On April 18, 1988, Davis was summoned into the office of Johnson where Carlisle was also present. Johnson told Davis that Davis had lost credibility with ownership and management, that the Bank had lost confidence in his ability to perform in the Dealer Department and that he should consider early retirement and resign, and if he did not, he would be placed on probation. (Tr. 97, 188, 231) According to Carlisle, former President, Chief Executive Officer and Chairman of the Board of the Bank, and who had been with the Bank prior to its acquisition by the holding company, there was never a time that Davis was not performing his job satisfactorily and Davis

was a good, loyal and competent employee. (Tr. 193) Carlisle was not surprised that Johnson asked Davis to retire early since the holding company had decided to replace the previously existing management team. (Tr. 194) While Carlisle was at the Bank, he never had any reason to consider placing Davis on probation. (Tr. 190) Moreover, he had not been contacted by Johnson or anyone else prior to April 18, 1990 to discuss Davis being asked to seek early retirement. (Tr. 200-201) According to Carlisle, the new management of the Bank and the holding company had decided to put their own people in place of the officers that had been at the Bank prior to the acquisition. Carlisle believed new management made things difficult for Davis by making it harder for him to get approval for the loans he presented. (Tr. 202) Of the officers that were at the Bank prior to its acquisition by the holding company, one officer remained at the Bank and one, who was no longer an officer, remained on the Board of Directors at the time of trial. Fifteen previous officers were replaced since the acquisition by the holding company. (Tr. 216)

Carlisle stated further that the "holding company type people" coming into the Bank were virtually implying in daily loan meetings that the particular loan officers that had been there for some time didn't know "what the heck to do to put a loan application or package" together. He further testified that the Bank used intimidation tactics against those officers. (Tr. 228) Carlisle described the meetings conducted by the Loan Committee as very tense and with a lot of pressure and intimidation. (Tr. 237-238) He further testified that the package preparations by Davis were reasonably prudent. (Tr. 239)

Concerning the meeting of April 28, 1988 with Johnson and Carlisle, Davis testified that Johnson had asked for Davis' resignation that day to be effective May 1, 1988. Davis did not indicate to Johnson at that time whether he would accept early retirement. (Tr. 98) Carlisle said nothing during this meeting. Davis testified that he believed Johnson had already made up his mind about ultimately getting rid of him because the statement "lost credibility" could apply to anything Davis did. He also knew that there was nothing he could do to satisfy the new management personnel, particularly Johnson and Jones. (Tr. 99) Jack Vernon, a former Senior Vice-President of the Bank, further testified that when the holding company came into the Bank, it weakened the previous officers and their ability to perform (Tr. 254); that it brought about constant changes in policy, placing high pressure upon the older officers (Tr. 255); that the new management under Johnson would rather not have the old community Banker present at the Bank (Tr. 256-257); and that the pattern was established that the new people were always younger and at a lower salaried level (Tr. 257).

When Davis' employment with the Bank ended, he was again replaced by Mills. (Tr. 273)

Davis did not resign voluntarily. (Tr. 103) On April 19, 1988, Davis requested of Johnson to permit him to take his three week vacation, which was allowed. Davis did not indicate to Johnson or to anyone else at that time that he was going to resign. (Tr. 100) Despite this, on that same date, Carlisle signed a letter announcing that Davis would retire from active duty effective May 1, 1988. Davis had not submitted any letter of resignation or indicated that he would resign as of that time. (Tr. 101, P. Ex. 8)

ARGUMENT AND AUTHORITIES

I

EXCUSAL OF FAILURE TO RENEW AT THE CLOSE OF ALL EVIDENCE

A defendant who fails to renew at the close of all evidence its motion under Rule 50(a)[2] made at the conclusion of the plaintiff's case-in-chief waives its right to move for judgment as a matter of law after the verdict.[3] A defendant whose motion at the close of a plaintiff's case is denied retains the right to present evidence on the merits of the case. However, the introduction of evidence at that point constitutes a waiver of the objection to the sufficiency of the evidence unless the motion is renewed

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[2] This case was tried prior to the 1991 revision of Rule 50, *Federal Rules of Civil Procedure,* although final judgment was entered one day after the effective date of the revision and, therefore, in effect at the time of the appeal. Applying *Bradley v. Richmond School Board,* 416 U.S. 696, the Rule in effect at the time decision on appeal is entered should be applied. For purposes of argument here, the motion made at the close of Davis' evidence will be referred to as the motion under Rule 50(a) or the pre-verdict motion for judgment as a matter of law. The post-verdict motion filed by the Bank will be referred to as the motion under Rule 50(b) or the post-verdict motion for judgment as a matter of law.

[3] *Herrington v. County of Sonoma,* 834 F.2d 1488 (9th Cir. 1987), *amended on other grounds,* 857 F.2d 567 (9th Cir.), cert. denied, 489 U.S. 1090 (1989); *Coker v. Amoco Oil Co.,* 709 F.2d 1433 (11th Cir. 1983); *Myers v. Norfolk Livestock Market, Inc.,* 696 F.2d 555 (8th Cir. 1982); *Mallick v. International Bhd. of Elec. Workers,* 644 F.2d 228 (3rd Cir. 1980); *Gillentine v. McKeand,* 426 F.2d 717 (1st Cir. 1970).

at the close of all evidence.[4] Not only must the motion be renewed, it must be specific as to the grounds asserted. The purpose here is to: (1) assure that the trial court has an adequate basis for its decision,[5] and (2) afford the adverse party the opportunity to introduce further evidence to cure any defects in its proof.[6] Petitioner is not ignorant of the existence of cases excusing compliance with Rule 50(a), i.e. where the Court indicated renewal unnecessary[7] or where the movant's evidence was nonexistent or obviously inconsequential.[8] Neither example situation presents itself in this case. Further, the Advisory Committee's Note to the 1991 Amendments to Rule 50 states in pertinent part:

> "Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of the trial, subject to renewal after a jury verdict has been rendered. The purpose of this requirement is to assure the responding party an

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[4] *Bogk v. Gassert*, 149 U.S. 17 (1892); *Wilson v. Haley Live Stock Co.*, 153 U.S. 39 (1894); *McCabe and Steen Co. v. Wilson*, 209 U.S. 275 (1908); *Bates v. Miller*, 133 F.2d 645 (2nd Cir. 1943); cert. denied, 320 U.S. 210 (1943); *Geo. C. Horning, Inc. v. McAleenan*, 149 F.2d 561 (4th Cir. 1945), cert. denied, 326 U.S. 761 (1945); *Moran v. Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973), cert. denied, 415 U.S. 932 (1974).

[5] *Moran v. Raymond Corp., supra.*

[6] *Seidman v. American Airlines, Inc.*, 923 F.2d 1134 (5th Cir. 1991).

[7] *Bohrer v. Hanes Corp.*, 715 F.2d 213 (5th Cir. 1983), cert. denied, 465 U.S. 1026 (1984).

[8] *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), cert. denied, 459 U.S. 1205 (1983), *Miller v. Rowan Cos.*, 815 F.2d 1021 (5th Cir. 1987).

> opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment. (Citations omitted.)
>
> The second sentence of paragraph (a)(2) does impose a requirement that the moving party articulate the basis on which a judgment as a matter of law might be rendered. The articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof. The revision thus alters the result in cases in which courts have used various techniques to avoid the requirement that a motion for a directed verdict be made as a predicate to a motion for judgment notwithstanding the verdict. *E.g. Benson v. Allphin,* 786 F.2d 268 (7th Cir. 1986) . . . "

This language indicates that the motion at the conclusion of all evidence is a condition precedent to a post-verdict motion, and for proper preservation for appeal of sufficiency of evidence on issues specified, and is not excusable. It protects the non-movant's right to be informed and to preserve fairness.[9] Although the circuits have differed as to what constitutes a sufficient reason for excusing compliance with the requirement of Rule 50(a), the amendment to the Rule and the Advisory Committee's Note thereon raises the question of whether the Courts of Appeal may excuse noncompliance without exceeding its authority or violating the Seventh Amendment guarantee of a trial by jury. Therefore, the Supreme

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[9] *Miller v. Premier Corp.*, 608 F.2d 973 (4th Cir. 1979).

Court should now address this issue so that there will be uniformity among the circuits and a clear understanding among litigants as to whether the failure to move for judgment as a matter of law at the close of all evidence may be excused without violating the Seventh Amendment.[10]

II

THE RULE 50 MOTIONS

A. Requisites of specificity of grounds for motion under Rule 50(a).

In an age discrimination case of disparate treatment, the plaintiff must make a prima facie case showing: (1) he was discharged; (2) he was qualified; (3) he was within the protected class; (4) he was replaced by someone not in the protected class; or (5) by someone younger or (6) his discharge was otherwise due to age.[11] In this case, because Davis had submitted a resignation, the first issue became that of whether he was constructively discharged.

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[10] In paragraph 11(b) of its opinion, the Court of Appeals indicated concern that this point may have been raised initially on appeal. To the extent that such addressed the arguments of Davis, it should be noted that in Plaintiff's Response to Defendant's Motion to Set Aside Jury Verdict filed January 17, 1991 (App. 46), Davis raised the issue of the failure of the Bank to renew its motion under Rule 50(a) at the close of all evidence and thereby waiving its entitlement to bring a motion under Rule 50(b). *Rawls v. Daughters of Charity of St. Vincent DePaul, Inc.*, 491 F.2d 141 (5th Cir. 1974), cert. denied, 419 U.S. 1032 (1974).

[11] *Elliott v. Group Medical and Surgical Serv.*, 714 F.2d 556 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984).

At the close of Davis' case-in-chief, the Bank moved for directed verdict on two specific issues: (1) demotion (that Davis' claim for discriminatory demotion occurred more than 300 days prior to the filing of the charge of discrimination, which Davis conceded) and (2) insufficiency of the evidence for the jury to find a *constructive discharge.* (Emphasis added) Regarding constructive discharge, the Bank argued that the evidence at that point would not sustain a finding that the working conditions were so intolerable as to constitute a constructive discharge under *Bourque v. Powell Electrical Mfg. Co.*[12] This point was challenged by Davis and the Court denied the Bank's motion.[13] Thereafter, the Bank called one witness to refute constructive discharge and to express legitimate nondiscriminatory reasons for its disparate treatment of Davis.[14] After the Bank rested, Davis again testified to show that the Bank's proffered reasons for his treatment were pretextual.[15] At no time pre-verdict did the Bank raise the ground of sufficiency of the evidence of age discrimination.

---

[12] 617 F.2d 61 (5th Cir. 1980).

[13] Although the Court of Appeals' opinion seems to infer the trial court may have indicated some form of reservation of its ruling, the Bank's motion on the issue of constructive discharge was denied. A fair reading of the trial court's ruling would require the Bank to renew its motion at the close of all evidence. (App. 85)

[14] *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988); *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (Title VII).

[15] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Court of Appeals held the requirement to renew the Rule 50(a) motion at the close of all evidence was excused because "only a few minutes had elapsed since the Bank had made the two motions for directed verdict."[16] This holding does not follow other cases excusing renewal because it allows excusal solely upon the element of time. In other cases where renewal was excused, it was founded upon the existence of two elements, (1) some clear indication by the trial court at that time that renewal was not necessary, and the evidence thereafter was either nonexistent or was obviously inconsequential to the issues raised in the earlier motion.[17]

The Bank ultimately filed its motion under Rule 50(b), expanding the grounds therefor to include the ground of insufficiency of the evidence "that age was a factor in Defendant's actions" (App. 57).

A motion under Rule 50(a) which specifically addresses one issue will not suffice to support appellate review on a different issue.[18] The requirement that grounds be specified in a Rule 50(a) motion is mandatory,[19] and must be stated with sufficient certainty to

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[16] *Davis v. The First National Bank of Killeen, Texas*, 979 F.2d 944 (5th Cir. 1992) at 949.

[17] *Miller v. Rowan Cos., supra.; Merwine v. Board of Trustees*, 754 F.2d 631 (5th Cir. 1985), cert. denied, 474 U.S. 823 (1985).

[18] *House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64 (5th Cir. 1972). *See* also *Rochester Civic Theatre, Inc. v. Ramsay*, 368 F.2d 748 (8th Cir. 1966) (motion for general directed verdict does not preserve individual issues, but only the question whether as a whole the evidence supports the verdict).

[19] *Budge Mfg. Co. v. U.S.*, 280 F.2d 414 (3rd Cir. 1960).

apprise the court and the opponent of the movant's position with respect to the motion.[20] The statement of one ground precludes the movant from later claiming that the motion should have been granted on a different ground.[21]

The Bank's assertion of insufficiency of the evidence regarding constructive discharge at the close of Davis' case-in-chief is not broad enough to encompass the separate issue of disparate treatment because of age. Indeed, the issue of constructive discharge is not dependent upon age being a factor therein. In *Bourque*, the Fifth Circuit stated:

> "To find constructive discharge we believe that the trier of fact must be satisfied that . . . the working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign". (Citations omitted.)[22]

The relevant inquiry for constructive discharge is to question the working conditions to which an employee is subjected, and whether they would cause a reasonable person to take the same action as that employee. It is not necessary to a finding of constructive discharge that the difficult or unpleasant working conditions arose from illegal discrimination. In the trial court's Charge to the

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[20] *Ryan Distrib. Corp. v. Calley*, 147 F.2d 138 (3rd Cir. 1945), cert. denied, 325 U.S. 859 (1945).

[21] *Western Oil Fields, Inc. v. Pennzoil United, Inc.*, 421 F.2d 387 (5th Cir. 1970).

[22] *Bourque*, 617 F.2d at 65.

Jury, the issues of constructive discharge and age discrimination were segregated and examined separately by the jury in accordance with *Elliott*. (App. 69.)[23]

Therefore, the Bank's Rule 50(a) motion did not exceed its straight-forward intention, that being simply that the evidence was insufficient to show whether the working conditions could support a constructive discharge finding, regardless of age discrimination. Moreover, the issue of age discrimination is not limited to the inquiry regarding constructive discharge. Evidence on the issue of age discrimination separate from discharge included Davis' loss of supervision over personnel and the pattern of being replaced three times by the same person outside the protected class. Neither of these facts are limited in their scope to constructive discharge only. Because the Court of Appeals did not limit its review to sufficiency of the evidence of constructive discharge, it exceeded its authority when it inquired into the unraised and unpreserved issue of age discrimination.

B. Motion under Rule 50(b) is a renewal of the motion previously made under Rule 50(a).

Even if renewal of the Rule 50(a) motion at the close of all evidence is excusable, the Bank waived age as a ground for judgment under Rule 50(b) by its omission from the earlier motion.[24] Since a Rule 50(b) motion is a renewal and not a modification of the Rule 50(a) motion, it may be premised only upon the particular grounds

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[23] *Elliott v. Group Medical and Surgical Serv., supra.*

[24] *Sweeney v. Westvaco Co.*, 926 F.2d 29 (1st Cir. 1991).

raised in that earlier motion.[25] As stated by the Eighth Circuit in *Mutual Beneficial Health & Accident Ass'n. v. Thomas*:[26]

> "it is only where a litigant has made motion for a directed verdict that he may ask the court to enter judgment *non obstante veredicto*. It is only in this manner that the question may be re-examined as a question of law. To ask the court to enter a judgment, contrary to a general verdict of the jury where no motion for a directed verdict has been interposed, is simply to ask the court to re-examine the facts already tried by the jury and this the court may not do without violating the Seventh Amendment."[27]

A second reason for requiring a motion at the close of all evidence as a condition precedent to a motion under Rule 50(b) is to avoid making a trap of the later motion.

> "At the time a motion under Rule 50(a) is made, the party against whom the motion is directed still has an opportunity to introduce further evidence to cure the defects in proof that might otherwise justify removing the case from the jury. A motion for judgment under Rule 50(b), without prior notice of alleged deficiencies of

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[25] *Montgomery Ward and Co v. Duncan*, 311 U.S. 243 (1940); *U. S. Industries, Inc. v. Blake Construction Co.*, 671 F.2d 539 (D.C. Cir. 1982); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 613 (3rd Cir. 1989); *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802 (3rd Cir. 1984), cert. denied, 477 U.S. 908 (1986); *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097 (5th Cir. 1981); *Meyers v. Moody*, 475 F.Supp. 232 (N.D. Tx. 1979), aff'd. 693 F.2d 1196 (5th Cir. 1982), cert. denied, 464 U.S. 920 (1983).

[26] 123 F.2d 353 (8th Cir. 1941).

[27] *Id.* at 355.

> proof, comes too late for the possibility of cure except by way of a complete new trial. The requirements of a motion at the close of the evidence is thus in keeping with the spirit of the rules to avoid tactical victories at the expense of substantive interests."[28]

Thus, the Bank could not obtain post-verdict judgment as a matter of law on age discrimination and could not properly raise the point for appeal.[29]

C. Appellate review.

Properly raised motions under Rule 50 are conditions precedent to appealing the sufficiency of the evidence.[30] Where a party fails to preserve sufficiency of the evidence for appeal, the court may not review it except to determine if there was a complete absence of evidence to support the verdict, without regard to sufficiency, or if there was any plain error resulting in a manifest miscarriage of justice.[31] The Court of Appeals has no authority to review sufficiency of the evidence for omitted or waived grounds.[32] By failing to renew its motion at the close of all evidence, the Bank's Rule 50(a) motion was

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[28] 5A Moore's Federal Practice, *Motions for Judgment as a Matter of Law*, ¶50.08 at 50-88 and 89. (1992)

[29] *Lewis v. Mears*, 189 F.Supp. 503 (D.C. Pa. 1960), aff'd. 297 F.2d 101 (3rd Cir. 1961), cert. denied, 369 U.S. 873.

[30] 9 Wright & Miller, *Federal Practice and Procedure*, §2540 at 611 (1972).

[31] *Hall v. Crown Zellerbach Corp.*, 715 F.2d 983 (5th Cir. 1983); *Urti v. Transport Commercial Corp.*, 479 F.2d 766 (5th Cir. 1973).

[32] *See Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991). *See* also *La Amiga Del Pueblo, Inc. v. Robles*, 937 F.2d 689 (1st Cir. 1991).

waived. Even if excused, the issue upon which the Court of Appeals reversed (age discrimination) was not preserved; therefore, the Court had only limited jurisdiction on appellate review. Where the issue on appeal was not made the subject of a Rule 50(a) motion, the standard of review is,

> "Limited to whether there was *any* evidence to support the jury's verdict, irrespective of its sufficiency, or whether plain error was committed which, if not noticed, would result in a 'manifest miscarriage of justice' ".[33] (Emphasis in original)

Here, the appellate court was restricted in its jurisdiction to the determination of whether there was any evidence to support the jury's verdict on age discrimination. Because the Court of Appeals acknowledged the existence of facts that supported the verdict, no manifest miscarriage of justice could occur through the verdict. There being no plain error, the Court of Appeals exceeded its authority and committed error by reversing the jury's verdict and rendering judgment.

The conclusion of the Fifth Circuit in this case was

> "We hold, therefore, that the evidence in the record of this case is insufficient to support the jury's factual finding of age discrimination by the Bank . . . "[34]

If there was any evidence to support the verdict, the Court of Appeals was powerless to reverse and render

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[33] *Coughlin v. Capitol Cement Co.*, 571 F.2d 290 (5th Cir. 1978) at 297.

[34] *Davis*, 976 at 951.

judgment. Because the Court acknowledged in its opinion the existence of evidence in support of the verdict, it was obligated to affirm, or at a minimum, remand for a determination of a new trial or a new trial. Its failure in doing so was error resulting in an injustice to Davis.

Because this case involves critical questions regarding 1) the required specificity of a pre-verdict motion under Rule 50(a), 2) the requirement of renewal of such motion at the close of all evidence if first made at the close of the nonmovant's case-in-chief, 3) the correct standard of review on appeal where the Rule 50(a) motion was waived or otherwise not preserved for appeal, and 4) the limits of authority of the Court of Appeals when these questions arise, the Supreme Court is respectfully requested to resolve these questions by granting this Petition for Writ of Certiorari.

III

CONSTITUTIONAL VIOLATIONS

A. Reweighing the evidence and credibility of the witnesses and the Seventh Amendment.

As the traditional finder of facts, it is the function of the jury, and not the Court, to weigh conflicting evidence and inferences and determine the credibility of witnesses.[35] It is not the purpose of Rule 50(b) to transfer to

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[35] *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

judges any part of the exclusive power of juries to weigh evidence and determine contested fact issues.[36]

A fair reading of the opinion of the Court of Appeals discloses the following assertions relied upon by the court to reverse and render:

(1) The need for changes in policies and procedures because of charging off $5 million dollars in loans, as well as stricter regulatory guidelines and "chaos in the banking industry in Texas"; (2) Lack of adaptability by Davis to the new lending environment; (3) The Bank president first offered ninety (90) day probation at the April 18 meeting; (4) Officers 40 years of age or older remained at the Bank after acquisition and new officers over the age of 40 were hired after the acquisition; (5) Davis elected to work part-time as a matter of choice post-termination; (6) Terminated employees from the prior regime were both over and under the age of 40; (7) Speculation that references to "old" employees confused the jury, possibly by design of counsel.

On three separate occasions, the Court's opinion refers to the Bank's assertion of lack of adaptability. However, Davis denied such and this was corroborated by the testimony of Carlisle. The jury was free to believe Davis was not adapting, or it could believe that he was made to appear resistant to change by the acts of the Bank. The Court of Appeals is here engaging in assessing credibility which they constitutionally may not do.

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[36] *Berry v. U. S.*, 312 U.S. 450 (1941).

A fair reading of the evidence as a whole shows that each assertion stated was strongly disputed and contested and upon which a reasonable jury could come to differing conclusions:

(a) Although reference was made to a $5 million dollar charge-off, testimony during trial revealed that none of the charge-off was an original loan made by the First National Bank of Killeen, but rather one in which the Bank was forced to participate, after the tact, by the holding company. The fact of policy and procedure changes in itself was not disputed, rather the discriminatory implementation of those changed policies and procedures, specifically concerning Davis, was hotly contested. The evidence showed, and a reasonable jury could conclude, that the Bank discriminately applied the changed policies and procedures, together with intimidation, to make Davis appear incompetent and resistent to change. Specific testimony from Carlisle substantiated Davis' use of reasonable prudence in presenting loan applications to the Loan Committee, as well as Davis' overall satisfactory performance. Davis disputed the Bank's charge that he was not adaptable to change. Moreover, it was undisputed that Davis never received a copy of the changed policies and procedures regarding dealer loans or any response to his letter communication to Johnson concerning the Dealer Department.

(b) The evidence showed direct conflict concerning the order of events at the meeting of April 18. While Johnson testified that he first offered probation prior to suggesting early retirement, Davis testified that the initial statement by Johnson was that Davis resign and retire early and, if he did not, probation would result. After

weighing the credibility of the testimony, the jury was free to believe either party and it believed Davis.

(c) Even though persons over and under the age of 40 remained in the Bank's employ or came on board after the holding company's acquisition, this relates to a question of disparate impact, rather than disparate treatment specifically of Davis. Davis' claim was that of disparate treatment, and the evidence disclosed discriminatory treatment at each of the three points of employment change where Davis was replaced by Steve Mills. The relevant inquiry in Davis' disparate treatment claim was why was he moved and who replaced him, not whether the Bank hired or retained other persons over forty for other positions. The patterns of selecting the same person under the age of 40 to replace Davis each time he was moved formed evidence upon which a jury could find discrimination.

(d) While the Bank disputed Davis' version of post-termination efforts to obtain employment, the jury was presented with evidence that he exercised prudence in seeking employment both in the banking industry and elsewhere, which established a disputed fact issue for the jury to resolve.

(e) The court's speculation as to confusion by the jury over references to pre-acquisition employees as "old" employees is just that – speculation.

Although the opinion refers to an admission by Davis of his failure to adapt,[37] Davis disputed this and raised a

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[37] *Davis*, 976 F.2d at 949.

jury issue thereon. Rather than being directed at the new policies and procedures themselves, Davis' criticisms were directed at his treatment under them, a treatment that included information, communication and assistance being withheld from him, to which he testified he was embarrassed and intimidated. A factual issue was here presented and, one properly left to the jury's determination.

Assuming arguendo, that the Court of Appeals had the power and authority to review the sufficiency of the evidence, still it committed error. This Court has held,

> "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the Court of Appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." (Citation omitted.)[38]

Although *Anderson* was a review of a Title VII discrimination case where the district court sat as the trier of fact, the rule therein stated is equally applicable where a jury is called upon to decide an age discrimination claim. Although the Court of Appeals denied they were reweighing the evidence and second-guessing the jury, that is exactly what they were doing. The Court of

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[38] *Anderson v. City of Bessemer*, 470 U.S. 564 (1985) (Title VII).

Appeals simply chose to believe the Bank's version of the facts, and this is not permissible.[39]

Because the actions of the Court involved the reweighing of the evidence and credibility of the witnesses, as well as inferences drawn therefrom, the Court of Appeals has improperly substituted its own conclusion for that of the jury, thereby violating the Seventh Amendment.[40]

Additionally, by reversing and rendering judgment in the face of a waived Rule 50(a) motion or, at least, upon an issue not preserved under Rule 50 and applying the sufficiency of the evidence standard to that unpreserved issue, the Court of Appeals has denied Davis' right to a jury trial in violation of the Seventh Amendment.[41]

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[39] i.e. " . . . reasons attributed *by the Bank's witnesses* to the need for changes." *Davis*, 979 F.2d at 947; "*Witnesses for the Bank* also testified that Davis demonstrated a lack of adaptability . . . but that, *in the opinion of the Bank's president* Davis' performance did not improve." *Id.* at 947; "*The president testified* that his purpose in calling the April 18 meeting was to place Davis on probation . . . " *Id.* at 947; "*the Bank's witnesses* also disputed Davis' version of post-termination efforts to obtain employment . . . " *Id.* at 947; "*Based on its version of the facts,* the Bank insists that Davis had no reasonable basis to conclude that his discharge was inevitable . . . " *Id.* at 949. (All emphasis added.)

[40] *See Wood v. Diamond M Drilling Co.*, 691 F.2d 1165 (5th Cir. 1982), cert. denied, 460 U.S. 1069.

[41] *Lumberman's Mutual Casualty v. Elbert*, 348 U.S. 48 (1954).

B. Due Process Requirements of the Fifth Amendment.

In the Advisory Committee Note to the 1991 Amendment of Rule 50, the initial comment of the Committee is:

> "The revision of this subdivision aims to facilitate the exercise by the Court of its responsibility to assure the fidelity of its judgment to the controlling law, a responsibility imposed by the due Process Clause of the Fifth Amendment. *Cf. Galloway v. United States*, 319 U.S. 372 (1943).

By this language the Committee indicates a correlation between the duties imposed by the Fifth Amendment and the requirements of Rule 50. Petitioner here asserts that the following six errors by the Court of Appeals all combine to violate the Petitioner's due process rights, as well as deprive him of his Seventh Amendment guarantee:

1) Excusing of the requirement to move for judgment as a matter of law at the close of all evidence,

2) Reviewing the sufficiency of the evidence on an issue not made the subject of a ground urged in the pre-verdict motion under rule 50(a),

3) Inferring the ground of age discrimination where it was not specifically stated as part of the motion under Rule 50(a),

4) Allowing the post-verdict motion under Rule 50(b) to include age discrimination when such was not made a part of the rule 50(a) motion,

5) Reviewing the sufficiency of the evidence on appeal upon a ground not properly preserved by being made a part of a timely rule 50(a) motion, and

6) Failing to review the evidence on the plain error standard where the issue upon which the Court of Appeals reversed was not properly preserved.

Where the Bank is allowed to escape the specific requirements of Rule 50, fairness is no longer applicable to Davis. It is the procedures of the rule that assure each side fairness under the law. Where a breach of the procedure is allowed by the appellate court, one party, here Davis, is denied due process under the Fifth Amendment.

Because the opinion of the Fifth Circuit is in conflict with the decisions of other Courts of Appeal, as well as indicates a departure from the accepted and usual course proceedings by exceeding its jurisdictional limitations with respect to Rule 50 and the guarantees of the Fifth and Seventh Amendments, this case presents special and important reasons for granting this Petition. Moreover, in view of the Advisory Committee's Note to the 1991 revision of Rule 50, the jurisdiction of the Court of Appeals to excuse a party from compliance with the Rule has been called into question necessitating this Court to exercise its power of supervision and interpretation.

Respectfully submitted,

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JAMES B. DAVIS, Plaintiff-Appellee, Cross-Appellant,

v.

The FIRST NATIONAL BANK OF KILLEEN, TEXAS, Defendant-Appellant, Cross-Appellee.

No. 91-8666.

United states Court of Appeals, Fifth Circuit.

Nov. 9, 1992.

Appeals from the United States District Court for the Western District of Texas.

Before POLITZ, Chief Judge, WISDOM and WIENER, Circuit Judges.

WIENER, Circuit Judge:

In this case, implicating the age discrimination in Employment Act (ADEA),[1] Appellant/Cross-Appellee First National Bank of Killeen (the Bank) convinced the district court to grant part of the Bank's motion for judgment notwithstanding the verdict (j.n.o.v.) to the extent the jury found that the Bank willfully violated the ADEA by constructively discharging Davis. The jury had awarded Davis $75,000 in damages. The Bank appeals the court's refusal to grant the remaining part of the motion for j.n.o.v. for other amounts awarded by the jury in connection with the discharge of Davis by the Bank, which the jury found to be constructive and to be discriminatory on the basis of age. By cross appeal, Davis

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[1] 29 U.S.C. §§ 621 *et seq.*

complains of the district court's j.n.o.v. reversing the jury's finding that the Bank knowingly violated the ADEA, and insists that the trial court erred in calculating the front pay awards in favor of Davis. Acknowledging that the facts present a close question but concluding nonetheless that the evidence is insufficient to supply the required nexus between the Bank's treatment of Davis and his age, we reverse the judgment of the district court and render judgment dismissing Davis's action.

I

FACTS AND PROCEEDINGS

Davis went to work for the Bank in 1955 and was employed there continuously until he resigned effective May 1, 1988, a period of approximately 33 years. In the course of his banking career, Mr. Davis rose to the position of Vice President in Charge of Commercial and Consumer Loans, a title he held at the time the present holding company owner acquired the Bank. He was also a voting member of the Loan Committee at that time, but was relieved of voting status following the change in ownership.

In July of 1987, Davis suffered a heart attack and was away from work for approximately five months. In November of that year, his doctor advised that Davis could return to work, beginning on a half-day basis, but the Bank's president advised Davis to stay home until he could return on a full-time schedule. In mid-December Davis met with the Bank's president to discuss full-time return and was advised that when he did it would be as

supervisor of the dealer department, at the same salary and with the title of Vice President.

Prior to his heart attack, Davis had been a member of a task force organized to analyze dealer loans and make recommendations for improved procedures. Following his heart attack, Davis was replaced on the task force by Mr. Steve Mills, an executive employee transferred to the bank from another bank owned by the same holding company. In his 30's, Mills also replaced Davis in the consumer loan department of the Bank.

When Davis returned to work he found he was the only member of the dealer department and that there were no personnel there for him to supervise. He did not have a secretary or anyone under his direct supervision to assist him. Neither before his heart attack nor after his return was Davis advised as to his duties, functions or responsibilities in the dealer department. He was furnished no documentation regarding changes in policies or procedures in that department, and his letter to the Bank's president concerning goals for the department went unanswered. In the conduct of his new assignment he was criticized by voting members of the Loan Committee in ways that Davis considered inconsistent and unfair.

In April, 1988, the president convened a meeting with Davis at which Mr. Rick Carlisle was present. Davis was advised that he had lost credibility with and the confidence of management and ownership. The president advised Davis to consider an early retirement resignation; that otherwise he would face being placed on probation. Carlisle, former President, CEO and Chairman of the

Board of the Bank testified as to Davis's loyalty and competence but acknowledged that in light of Carlisle's impression that the new ownership group had decided to replace the previously existing management team with new employees more attuned to the style and policy views of the new ownership, Davis's future was bleak. It was Carlisle's opinion that the new ownership had decided to put their own people in to replace executives of the Bank whose tenure pre-dated the holding company's acquisition. Carlisle was satisfied that the officers from the previous regime who still remained at the Bank simply did not fit in with the new concepts brought in by the holding company after the acquisition. He speculated that new management could ease out members of the preexisting regime by making it difficult for them to get their loans approved. Carlisle observed that 15 officers from the former regime were no longer with the Bank; that only one was an active officer; and that a second was a member of the Board only. Even Carlisle admitted his disagreement with style and policy of the new management. According to Davis, Carlisle said nothing during the meeting with the Bank's president, and Davis himself gave no indication to the President whether he would resign as requested, effective May 1, 1988, or continue subject to probation. Davis stated that he knew, however, that the die was cast by the tone of the meeting and the statements about loss of confidence and credibility.

Another former officer, Mr. Jack Vernon, testified that in his opinion the holding company intentionally weakened the ability of the pre-existing officers to perform, and that new management preferred not to have members of the pre-acquisition officer corps, with their close

ties to the community, involved in running the Bank. Vernon testified that he observed a pattern of replacing members of the pre-existing team with younger employees.

Still without advising of his decision, Davis asked the president on the day following the meeting with Carlisle, for permission to take three weeks' vacation which permission was granted. Despite Davis's postponement of making his decision, Carlisle wrote on that day (April 19, 1988) announcing to other bank personnel that Davis would retire, effective May 1. Thereafter, Davis wrote to Carlisle, the Bank president and other members of the Board, recounting his version of the April 18th meeting, his shock, his financial needs, and the inevitability of his termination by current management, concluding that he had no choice but to end his 33 years of service by resigning effective May 1, 1988. He was again replaced by Mills.

Davis testified that, following the effective date of his termination, he sought employment in and around Killeen, attempting to sell water purifiers, to obtain an insurance license, and to be come a salesman for A.L. Williams Company. He further testified that efforts to obtain bank employment were fruitless given the condition of the banking industry in the Killeen area, as well as his age and physical conditions but that he had remained willing to return to the Bank as Vice President in Charge of Commercial and Consumer Loans.

According to witnesses for the Bank, new management determined on the basis of internal audits that some

$5 million in loans had to be charged off and that significant changes were needed in the Bank's lending policy as well as other policies and procedures. Stricter Comptroller of the Currency guidelines and regulations as well as the chaos in the banking industry in Texas and surrounding states were other reasons attributed by the Bank's witnesses to the need for changes. There is no dispute but that drastic policy and philosophy changes were made and that the changes were shocking to employees whose service pre-dated the change in ownership. This was particularly true for loan officers whose procedures were changed most drastically. Also uncontested is the fact that when Mills was brought in from another bank following Davis's heart attack, he (Mills) was under the ADEA's triggering age of 40 years, and his salary was "slightly less" than Davis's.

Witnesses for the Bank also testified that Davis demonstrated a lack of adaptability to the new lending environment and that his deficiencies were pointed out to him but that, in the opinion of the bank's president, Davis's performance did not improve, leading to the meeting of April 18, 1988. The president testified that his purpose in calling the April 18th meeting was to place Davis on probation, and that when the 90-day probation was announced to Davis he responded that he was not going to accept probation. The president testified that he was surprised by the reaction because probation was not offered as a choice; but that in light of the unexpected reaction, he told Davis he should consider early retirement and that the Bank would confect an early retirement package for Davis to consider. According to the president, he was informed by Davis the next day that he

(Davis) would take early retirement after using his remaining vacation prior to the effective date of resignation. April 19, 1988, was Davis's last day at work.

The early retirement package proposed by the Bank was presented to and accepted by Davis on April 27, 1988. In addition, Davis received a lump sum distribution of $204,000 from the Bank's profit sharing plan, of which $179,340.74 represented the Bank's contributions, earnings and forfeitures.

The record reflects that officers of the Bank who were 40 years of age or older and whose employment predated the holding company's acquisition were still employed by the Bank at the time of trial, and that new officers over the age of 40 and even over the age of 50 had been hired after the acquisition. The Bank's witnesses also disputed Davis's version of his post-termination efforts to obtain employment, contending that he made no significant efforts until his severance pay was exhausted and that he elected to work part-time as a matter of choice.

Davis filed suit in federal district court on February 20, 1990. On August 30, 1990, Davis filed his First Amended Complaint alleging 1) that he was demoted by the Bank because of his age, in violation of the ADEA; 2) that he was constructively discharged from employment by the Bank because of his age; 3) that he was defamed; 4) that the Bank intentionally inflicted emotional distress on him; and 5) that the bank acted with wanton disregard, warranting an award of exemplary damages.

On September 19, 1990, the district court granted Davis's motion to dismiss his claims for defamation and

intentional infliction of emotional distress, leaving for trial only his claims for age discrimination and exemplary damages. On October 16, 1990, the court granted partial summary judgment in favor of the Bank, holding that exemplary damages are not recoverable under the ADEA.

The case was tried to a jury on October 25, and 26, 1990. The Bank made an unopposed motion for directed verdict at the close of Davis's evidence which motion the court granted, dismissing the claim of demotion based on age. When all evidence was in, the jury returned a verdict for Davis, awarding him $75,000 for the Bank's willful violation of the ADEA by constructively discharging Davis.

Each party made post-judgment motions. The Bank's motion for j.n.o.v. was granted in part, the court reversing the jury's finding of willfulness. Final judgment was entered on December 3, 1991, awarding Davis $75,000 in back pay, $131,800 in front pay for four year's salary, pre-judgment interest at the rate of 10% per annum, and attorney's fees equaling one-third of the judgment. The Bank timely filed its notice of appeal on December 13, 1991, and Davis timely filed his notice of cross-appeal on December 20, 1991.

II

ANALYSIS

A. *Standard of Review*

A substantive review challenging a jury verdict is reviewed under our long-standing standard articulated in

Boeing v. Shipman.[2] Under that standard we seek to determine whether

> reasonable and fair-minded [jurors] in the exercise of impartial judgment might reach different conclusions. . . . A mere scintilla is insufficient to present a question for the jury. . . . However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

In recent years we have applied the test of *Boeing v. Shipman* in numerous age discrimination cases.[3]

B. *Waiver*

Before addressing the substantive issue of sufficiency of the evidence to support the jury verdict, we must answer the preliminary procedural question whether the Bank waived its right to challenge the verdict when it failed to renew its motion for a directed verdict at the close of all evidence. Apparently the first time this issue was raised was on appeal. On the one hand, we agree with our colleagues of the Seventh Circuit that appellate courts should "not view favorably the raising of an issue, particularly a technical one, for the first time on appeal."[4] We have observed on the other hand, however, that both this circuit and the Seventh Circuit have approached this

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[2] 411 F.2d 365, 374-75 (5th Cir.1969) (en banc).

[3] *See, e.g., Normand v. Research Inst. of Am.*, 927 F.2d 857, 859 (5th Cir.1991).

[4] *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 576 (7th Cir.1976).

issue with a "liberal spirit" in pursuit of "securing a fair trial for all concerned in the quest for truth."[5] In essence, the circuit courts have inquired whether prejudice would result from waiving technical compliance with Fed.R.Civ.P. 50(b).

At the close of Davis's case, the Bank made two motions for directed verdict, one of which was granted and the other declined "at this time." The Bank then called one witness, after which Davis was recalled to the stand. Then both sides closed, after only a few minutes had elapsed since the Bank had made the two motions for directed verdict. This de minimis lapse equates with the one we forgave in *Merwine v. Board of Trustees.*[6] We are constrained to do so here.

C. *Evidence of Age Discrimination*

Although there is agreement on many of the facts of this case, the parties vigorously contest those surrounding the issues of constructive discharge and willfulness on the part of the Bank. Based on its version of the facts, the Bank insists that Davis had no reasonable basis to conclude that his discharge was inevitable merely because the Bank proposed a 90-day probationary period.

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[5] *Bohrer v. Hanes Corp.*, 715 F.2d 213, 217 (5th Cir.1983) (quoting *Bonner v. Coughlin*, 657 F.2d 931, 939 (7th Cir.1981) (quoting *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir.1978), *cert. denied*, 440 U.S. 930, 99 S.Ct. 1267, 59 L.Ed.2d 486 (1979))), *cert. denied*, 465 U.S. 1026, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984).

[6] 754 F.2d 631, 635 (5th Cir.) *cert. denied*, 474 U.S. 823, 106 S.Ct. 76, 88 L.Ed.2d 62 (1985).

Davis on the other hand insists that he was given a Hobson's Choice because whether he accepted the proposal of continued employment under probation or took early retirement by resigning as suggested by the Bank, he was on the way out in a very short time. Also, Davis insists that the jury correctly found not only constructive discharge based on age but intentional or willful conduct by the Bank in its actions.

Those contested issues become moot, however, if our examination of the evidence in the record of this case convinces us that such evidence is insufficient to demonstrate that the Bank's treatment of Davis was driven by discriminatory animus based on age. For purposes of examining the sufficiency of such evidence, then, we assume without deciding that Davis was constructively discharged by the Bank, and that the Bank did so willfully.

Although recent statutory enactments and at least one judicial decision have created narrow exceptions to the doctrine of at-will employment in Texas, that doctrine is alive and well, particularly in the private sector – so much so as to require no citation here. Davis does not allege an employment contract with the Bank and thus does not dispute that his employment was subject to termination without cause. Rather, he insists that he was terminated for cause but that such cause was illicit, i.e., that at age 53 he was terminated for no real reason other than to permit the Bank to replace him with an employee under the age of 40, at a lesser salary.

Even though Davis stated a cause of action upon which relief could be granted under the ADEA when he

alleged and proved that he was over the age of 40 *when* his employment ceased and that his replacement was under the age of 40, a case for age discrimination here is at best extremely weak. Evidence presented by Davis and by the Bank paints a clear picture of new corporate ownership coming in with new and drastically different business methods, policies and philosophies, and implementing them to a large extent by replacing carry-over employees from the old regime with new bank officers who were willing and able to implement the plans of the new owners. Significantly, however, the evidence demonstrates that among those from the prior regime who were terminated there were employees both over and under the age of 40; and that among the new hires were persons both over and under the age of 40.

True, the record is not totally devoid of evidence that might suggest age discrimination. In addition to the key fact that Davis was replaced by someone significantly younger than he, the record demonstrates that Davis worked without criticism by the new regime for almost two years prior to his heart attack; that he was asked to think about early retirement; that his letter concerning departmental goals went unanswered; and that, while it is true that even the younger employees of the prior regime were being closely scrutinized and required to improve their performances, replacements tended to be younger than their immediate predecessors.

On the other hand, the record evidence supporting the Bank's proffer of non-discriminatory reasons for Davis's problems is strong. Clearly he did not adapt to the new standards imposed by the new owners. This failure to adapt – which Davis admits but attempts to

justify by offering criticism of the new procedures adopted by his new employers – is strikingly similar to the justification attempted by the plaintiff in *Guthrie v. Tifco Industries,*[7] which we rejected as insufficient to overcome the valid reasons for termination given by the employer in overcoming allegations of age discrimination. The testimony of Carlisle and Vernon, far from indicating age discrimination, confirms the Bank's position that Davis was among a number of pre-acquisition employees who had failed to accept or adjust to the changes wrought by the new regime. Even though Davis's job performance did not constitute a "deliberate violation of both company policies and management directives" as had the performance of the employee in *Bohrer v. Hanes,*[8] there is sufficient evidence that, upon his return, Davis simply could not or would not adapt to the new standards on which his superior insisted.

Neither can we overlook the fact that the "young" employee who replaced Davis had to be brought into the Bank originally when Davis suffered his heart attack and could not work for many months. That replacement employee was already working for another bank owned by the same holding company; absolutely nothing approaching invidious age discrimination can be inferred from that initial occurrence; and in turn it supports the non-discriminatory explanation given by the Bank for having the same younger employee replace Davis after permanent severance of employment.

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[7] 941 F.2d 374, 378-79 (5th Cir.1991), *cert. denied,* ___ U.S. ___, 112 S.Ct. 1267, 117 L.Ed.2d 4954 (1992).

[8] 715 F.2d at 218-19.

Moreover, a careful reading of the record demonstrates that the jury heard repeated references to the pre-acquisition employees as the "old" employees. Although ostensibly meaning nothing more than that such persons worked for the Bank before the holding company acquired it, we speculate that the jury may well have become confused – possibly by design of counsel – in thinking the reference was one to chronological age, not merely to pre-acquisition employment.

We repeat that it is not our province to re-weigh the evidence and second guess the jury, and the foregoing discussion should not be read as though we are doing so. Under *Boeing v. Shipman*,[9] we are only permitted to determine whether there is sufficient evidence to permit reasonable jurors to reach different conclusions. The different conclusions referred to here are not whether Davis was treated fairly, or whether the Bank acted unfairly toward Davis, or whether Davis's criticism of the new policies was valid, or whether the Bank "set up" Davis after his return so that, as a member of the pre-acquisition coterie of officers, he was bound to stumble and therefore be fired, or anything else relative to the employer-employee relationship *except* the part if any played by age in the parting of the parties' ways. When we scour the record for evidence of the nexus between Davis's age and his willful constructive discharge (which we here assume), we find at most the proverbial scintilla but nothing more. Unlike the record in *Normand v. Research Institute of America* in which we found "just

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[9] 411 F.2d at 374-75.

enough evidence to support the jury's verdict,"[10] the record here simply does not contain that "just enough" modicum of evidence of age discrimination to supply that all-important nexus between the Plaintiff's age and his assumed constructive discharge. We hold, therefore, that the district court erred in refusing to grant the Bank's motion for judgment n.o.v. on the issue of the discrimination proscribed by the ADEA.

D. *Other Issues on Appeal and Cross-Appeal*

As the district court partially granted the Bank's motion for j.n.o.v. to the extent of willful or intentional age discrimination, and as we now hold that the evidence is not sufficient to support the jury's finding of age discrimination *vel non*, our reversal and rendering of a take nothing judgment against Davis renders moot the other issues presented by the Bank's appeal and Davis's cross appeal. And as we are thus not required to address those issues, we shall not.

III

CONCLUSION

Even when we assume for the sake of our consideration here that Davis was constructively discharged by the willful acts of the Bank, a careful combing of the record reveals not only a surplus of evidence to support the Bank's contention that it made no employment decision vis-a-vis Davis on the basis of age; but likewise a

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[10] *Normand*, 927 F.2d at 865.

dearth of evidence to support the essential finding of the element of age discrimination. We hold, therefore, that the evidence in the record of this case is insufficient to support the jury's factual finding of age discrimination by the Bank, so we REVERSE the judgment of the district court and RENDER a take nothing judgment against Davis, dismissing his age discrimination claims under the ADEA, and likewise dismissing all remaining issues of the Bank's appeal and Davis's cross-appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B. DAVIS, Plaintiff, v. THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, Defendant.	§ § § § § § § §	Civil No. W-90-CA-034

ORDER

(Filed Jan. 24, 1991)

Came on to be considered post-trial motions filed by the parties. This is an age discrimination case, tried to a jury on October 24-26, 1990. The jury returned a verdict for the Plaintiff finding: 1) he was discharged by Defendant; 2) that age was a reason for Plaintiff's discharge and that he would not have been discharged regardless of his age; 3) that the decision to discharge was willful; and 4) that $75,000.00 would compensate the Plaintiff for his damages.

A. Compensatory Damages

Plaintiff moves the Court to enter a judgment, notwithstanding the jury's verdict of $75,000.00 in the amount of $156,453.71 as compensatory damages. Plaintiff's argument is that Defendant did not show a failure to mitigate damages. Defendant responds that the evidence shows the Plaintiff failed to mitigate his damages and that an award of back pay cannot stand. The Plaintiff is

required to use reasonable efforts to find other employment after his discharge. *See Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1468 (5th Cir.), *cert. denied*, 110 S.Ct. 129 (1989); *see also Sellers v. Delgado College*, 902 F.2d 1189, 1192-94 (5th Cir. 1990). The determination of the reasonableness of Plaintiff's efforts is a fact question for the jury. *See Hansard*, 865 F.2d at 1465; *see also Sellers v. Delgado Community College*, 839 F.2d 1132, 1138 (5th Cir. 1988). The jury considered the testimony of witnesses for both parties regarding this issue and adjusted the Plaintiff's award accordingly. *See Sellers*, 902 F.2d at 1194-95. Therefore, Plaintiff's compensatory damages will be entered in accordance with the jury finding of $75,000.00.

B. Liquidated Damages

The jury found the Defendant's conduct to be willful. Pursuant to the ADEA, the Plaintiff is therefore entitled to liquidated damages in the additional amount of $75,000.00 *See* 29 U.S.C. § 626(b). However, if the Court makes a finding that Defendant acted in good faith with a reasonable belief that its action did not violate the ADEA, such an award is within the Court's discretion. *See Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 558 n.2 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22 (1985). A violation of the ADEA is "willful" if the Defendant acted knowingly or recklessly. *See Thurston*, 469 U.S. at 126. The Defendant's knowledge that the ADEA applied or was "in the picture" is not sufficient for the assessment of liquidated damages. *Id.* at 127-28. Liquidated damages are available in cases involving only the

most egregious violations. *See Hansard*, 865 F.2d at 1470. The evidence established that Plaintiff was moved to the Dealer Loan Department for health reasons. Furthermore, Defendant sought to place Plaintiff on probation for his poor performance. In the alternative, Plaintiff was offered the option of retirement/resignation. The evidence does not support a finding of an egregious violation, but a good faith decision. Therefore, the jury's finding of willfulness will be disregarded.

C. Reinstatement

Whether or not to reinstate the Plaintiff is within the Court's discretion. *See Hansard*, 865 F.2d at 1469-70. Reinstatement, if feasible, is the preferred remedy for a victim of age discrimination. *See Johnson v. Chapel Hill Indep. School Dist.*, 853 F.2d 375, 382 (5th Cir. 1988). As both parties indicate, little evidence was presented on this issue at trial. Plaintiff states he is willing to return to work, although he is concerned about future discriminatory treatment. Defendant points out that the evidence does show it was reducing its work force, the poor economic status of the Killeen area, and its dissatisfaction with Plaintiff's job performance. Based upon the evidence presented at trial, the Court has determined that reinstatement is not infeasible. Accordingly, Plaintiff will be reinstated. The Court does not reach the front pay issue.

D. Pre-judgment Interest

The award of pre-judgment interest is within the Court's discretion. *See Hansard*, 865 F.2d at 1471-72; *Heiar v. Crawford County*, 746 F.2d 1190, 1201 (7th Cir. 1984),

cert. denied, 472 U.S. 1027 (1985). In light of the fact that liquidated damages have been denied, the Court awards pre-judgment interest. *See Heiar*, 746 F.2d at 1201-02.

Plaintiff has filed his Motion for Judgment and Defendant its Motion for Judgment N.O.V. and Motion to Set Aside Jury Verdict and to Enter Judgment for Defendant. Having considered such motions, the jury's verdict and the evidence, it is accordingly,

ORDERED that Plaintiff have and recover from Defendant the total sum of $75,000.00 plus prejudgment interest at the legal rate per annum; that Plaintiff be reinstated on or before March 1, 1991, unless the parties agree otherwise; that Defendant's motions to set aside the jury's verdict and for judgment n.o.v. are partially **GRANTED** as to the issues of willfulness and liquidated damages and **DENIED** in all other respects; and that Plaintiff's request for attorney's fees will be considered after compliance with Local Rule CV-7(j).

SIGNED this 24th day of January, 1991.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B. DAVIS, Plaintiff,	§	
v.	§	Civil No. W-90-CA-034
THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, Defendant.	§	

ORDER

(Filed Sept. 27, 1991)

Came on to be considered several motions filed by the parties. This was an age discrimination case that was tried to a jury on October 24 and 25, 1990. The jury found for the Plaintiff and, after several post-trial matters, the Court entered its judgment on January 24, 1990.

A. Defendant's Motion for Judgment Notwithstanding the Verdict

The Court must consider all of the evidence in a light most favorable to the Plaintiff. *See Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). However, it is the job of the jury to assess witness credibility and weigh the evidence. *Id.* at 375. First, Defendant claims that the evidence presented did not show that the Plaintiff was discharged or that age motivated the Defendant. Second, Defendant claims the evidence does not support the jury's award of $75,000.00 in damages.

1) Constructive Discharge and Age

To find constructive discharge, the jury "must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *See Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980) (quoting *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977)). The question is what would a reasonable person in the same situation have done. *See Guthrie v. J.C. Penney Co.*, 803 F.2d 202, 207 (5th Cir. 1987). In an age discrimination case, the plaintiff must make a *prima facie* showing that: (1) he was discharged; (2) he was qualified; (3) he was within the protected class; (4) he was replaced by someone not in the protected class, or (5) by someone younger, or (6) his discharge was otherwise due to age. *See Elliott v. Group Medical & Surgical Serv.*, 714 F.2d 556, 565 (5th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984). Such a showing will shift the burden of production to the Defendant to rebut a presumption of discrimination by presenting a "legitimate, nondiscriminatory reason for its disparate treatment of the Plaintiff." *See Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1505 (5th Cir. 1988). If the Defendant is successful, then the Plaintiff must show that the reasons presented by the Defendant are pretexts for illegal discrimination. *Id.* To do this, the Plaintiff must show that the Defendant was more likely motivated by a discriminatory reason or that the Defendant's reason is not credible. *Id.; see also Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1316 n.9 (5th Cir. 1986) (plaintiff must discredit employer's articulated reason or show that a discriminatory reason was more likely the motivation).

It is undisputed that Plaintiff was within the protected class and was replaced by someone outside the class. There was testimony, from the Plaintiff and others, that Defendant's new management made it extremely difficult for the Bank's existing employees. Plaintiff had worked for the Bank since 1955. When Plaintiff returned from medical leave in January, 1988, he was moved to a different position. Defendant claimed this was done for the sake of Plaintiff's health, yet the Plaintiff perceived it as a demotion. Plaintiff's performance was then criticized and he was told that he had lost credibility. Defendant eventually (April, 1988) presented Plaintiff with the option of probation, resignation, or retirement. Witnesses for the Defendant claimed the Bank was merely instituting new policies to insure its future success. To this end, Defendant presented evidence that Plaintiff's performance was suffering. The jury found for the Plaintiff on the liability issue. *See Guthrie*, 803 F.2d at 207-08; *see also Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461, 1465-66 (5th Cir.), *cert. denied*, 110 S.Ct. 129 (1989); *Uffelman v. Lone Star Steel Co.*, 863 F.2d 404, 407-08 (5th Cir.), *cert. denied*, 109 S.Ct. 2488 (1989).

2) Back Pay Award

The Defendant's contention regarding Plaintiff's damages is more troublesome. Plaintiff received a lump sum retirement benefit upon discharge. Part of this benefit, $179,340.74 to be exact, came from the Defendant ($34,987.04 contributed by Defendant, $138,427.02 as earnings thereon, and $5,926.68 in forfeitures). The amount of damages the Plaintiff asked the jury to award was less than the retirement benefits received. The Court

instructed the jury to deduct retirement benefits received from any award of back pay. The jury awarded the Plaintiff $75,000.00.

The law in the Fifth Circuit on this subject is scant. It has been held that retirement benefits coming from a defendant employer should be set off. *See Guthrie,* 803 F.2d at 210 (back pay award should be reduced by payments from retirement fund). As one court has stated, the Fifth Circuit is one of the only circuits to have reversed a district court for not offsetting retirement benefits. *See Equal Employment Opportunity Comm'n v. O'Grady,* 857 F.2d 383, 390 (7th Cir. 1988). However, the offset of unemployment compensation is discretionary with the Court. *See Merriweather v. Hercules, Inc.,* 631 F.2d 1161, 1168 (5th Cir. 1980); *Marshall v. Goodyear Tire & Rubber Co.,* 554 F.2d 730, 736 (5th Cir. 1977). The *Guthrie* Court relied on the "only Fifth Circuit case" available to hold that the collateral source rule does not apply when the defendant is the collateral source. *See Guthrie,* 803 F.2d at 210; *see also Smith v. Office of Personnel Mgmt,* 778 F.2d 258, 263 (5th Cir. 1985), *cert. denied,* 476 U.S. 1105 (1986). The collateral source rule prevents the reduction of a plaintiff's recovery due to benefits received from a third party. *See Smith,* 778 F.2d at 263. The test is "whether the benefits were provided or funded by the employer or the employee." *See Johnson v. Chapel Hill Ind. School Dist.,* 853 F.2d 375, 382 (5th Cir. 1988).

Here, the Plaintiff had participated in the First National Bank of Killeen Employees Profit Sharing Retirement Trust (Trust) since 1960. Both the Defendant employer and the Plaintiff employee funded the Trust. There is authority stating that "funds supported in part –

but not entirely – by contributions from the defendant are generally considered collateral." *See O'Grady*, 857 F.2d at 390. However, *O'Grady* and the cases cited therein involved funds contributed to by defendant employers, but controlled by third parties. *See id.* at 389-91. Defendant employers contributed "in support of an independent, legislatively-mandated social policy." *See Guthrie*, 803 F.2d at 209. The details of the Trust in this case are not in evidence. Therefore, the Court cannot determine whether the Trust was controlled by a third party or whether it supported an independent social policy mandated by the legislature. *See Johnson*, 853 F.2d at 382 (court upheld trial court's refusal to deduct retirement benefits due to lack of evidence). Whether or not the benefits are collateral cannot be stated with any certainty.

The Third Circuit has held that pension plans should not be deducted from back pay awards, whether supported by an employer directly or indirectly, because they serve different social policies. *See McDowell v. Avtex Fibers, Inc.*, 740 F.2d 214, 217 (3rd Cir. 1984), *vacated on other grounds*, 469 U.S. 1202 (1985). This case involves an employee profit sharing retirement trust which apparently relies upon employee *and* employer investments. While guidance is limited, it appears that *Guthrie* dealt with a pension funded by the employer alone. *See Guthrie*, 803 F.2d at 210 (Court refers to it as *Penney's* retirement fund); *see also O'Grady*, 857 F.2d at 391 (court distinguished *Guthrie* by stating Penney's own retirement plan was funded by employer).

The Trust contains funds contributed by both Plaintiff and Defendant which have been invested to provide

for employee retirement. According to the evidence presented, the collateral source is the Plaintiff and Defendant. Does the law require set off of only the amount contributed by the Defendant, or that amount plus its earnings, or nothing at all? These earnings were meant to be the Plaintiff's. However, without the Defendant's contributions, the earnings would not exist. The statement of contributions and earnings designates those made by the Plaintiff separate and apart from those made by the Defendant. Here, the Defendant has, according to Plaintiff's Exhibit 17, contributed $34,987.04 which has earned $138,427.02. Plaintiff has contributed $15,924.17 which has earned $16,315.89. Plaintiff's interest in the fund was completely vested. The Fifth Circuit has stated in dicta that "vesting means only that an interest is no longer subject to possible forfeiture and an employee becomes entitled to all of the amounts which have been credited to his pension account." *See Ganze v. Dart Industries, Inc.*, 741 F.2d 790, 792 (5th Cir. 1984). The jury obviously adjusted its award based upon these figures and the Court's charge to some extent. The Plaintiff requested approximately $150,000.00 and the jury awarded $75,000.

Victims of age discrimination are awarded back pay to make them whole. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). A back pay award should put the Plaintiff where he was before the discrimination occurred. *See Sellers v. Delgado Community College*, 839 F.2d 1132, 1136 (5th Cir. 1988) (Title VII case). However, the Plaintiff should not receive a windfall nor the Defendant be made to pay twice. *See O'Grady*, 857 F.2d at 389-90; *see also Cline v. Roadway Express, Inc.*, 689 F.2d 481, 490 (4th Cir. 1982). If the Court treats the Plaintiff's

retirement benefits as his back pay award, the Plaintiff may be whole in that he recovers the salary and benefits he would have earned had he not been illegally discharged. Of course, the Plaintiff cannot be truly whole until he is reinstated or awarded front pay. Once this is done, the Plaintiff has a job and salary again. However, the Plaintiff is not then completely whole because he no longer has retirement benefits to rely on when he voluntarily retires. To stop at this point rewards the Defendant for discrimination. The Plaintiff loses his retirement benefits because the Defendant discriminated against him. In other words, had the Defendant not discriminated, the Plaintiff would have continued in a salaried position until he chose to retire at which time he would receive his retirement benefits. *See Cline*, 689 F.2d at 490. Certainly, this is not the result intended by Congress in drafting the Age Discrimination in Employment Act. One court has held that a person in his sixties legally discharged for poor performance should not lose pension rights that have been accruing during his employment as a result. *See Cowlishaw v. Armstrong Rubber Co.*, 450 F.Supp. 148, 153 (E.D.N.Y. 1978). It makes little sense to hold that Plaintiff should lose his retirement benefits when he has successfully proven the Defendant's actions to be illegal.

At least one court has required a plaintiff to return the pension benefits he had received. *See Jirus v. City of Berwyn*, 712 F.Supp. 672, 674 (N.D. Ill. 1989). The pension fund in *Jirus*, The City of Berwyn Pension Fund, was a state agency established pursuant to state law. *Id.* Both the plaintiff and the defendant contributed to the fund. *Id.* However, the defendants contributions were twice as much as the plaintiff's. *Id.* For that reason, the court

decided to depart from the collateral benefits rule and require the plaintiff to reimburse the fund. *Id.* The First Circuit has held that when reinstatement is not ordered for a successful ADEA plaintiff, he should receive pension benefits that have accrued from the time of his hiring until damages are settled. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021 (1st Cir. 1979); *see also Bleakley v. Jekyll Island – State Park Auth.*, 536 F.Supp. 236, 245 (S.D. Ga. 1982). Another court refused to require the plaintiff to "disgorge his 'gain' as a condition of reinstatement." *See Sinclair v. Insurance Co. of North America*, 609 F.Supp. 397, 402 (D.C. Pa. 1984), *aff'd*, 782 F.2d 1031 (3rd Cir. 1986). The court did not consider money plaintiff had received as early retirement benefits when calculating back pay. *Id.* at 402 n.6.

The cases cited in *Guthrie* and *Smith* provide little help. In *Orzel*, the decision to deduct unemployment compensation and retirement pension benefits was discretionary. *See Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 756 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983). The magistrate did not want to permit a double recovery by the plaintiff for his lost employment. *Id.* As has been shown, no double recovery is present in this case. *Naton* involved a discretionary reduction of back pay by unemployment compensation paid from a state fund supported by both plaintiff and defendant. *See Naton v. Bank of California*, 649 F.2d 691, 700 (9th Cir. 1981). Both *Orzel* and *Naton* are cited by the Fifth Circuit as "the rule that should be applied in cases involving federal ADEA claims." *See Smith*, 778 F.2d at 263. In *Guthrie*, the Fifth Circuit cites three cases other than *Smith* that support a reduction of a back pay award. In *Hagelthorn*, the Court reduced the plaintiff's award of back pay only by pension

benefits received "during the period for which the jury awarded back pay." *See Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86-87 (2nd Cir. 1983). The Court did not deduct the entire amount of pension benefits paid to the plaintiff by the defendant. *Id.* The Seventh Circuit has held that pension benefits accrued prior to termination have been earned by the claimants. *See O'Grady*, 857 F.2d at 391. The pension deducted in *Fariss* would not have been paid at all had the plaintiff worked until his death. *See Fariss v. Lynchburg Foundry*, 769 F.2d 958, 966 (4th Cir. 1985). But for the plaintiff's termination, he would not have received the pension. *Id.* Had the Plaintiff in this case not been illegally discharged, he would have received the retirement benefits once he voluntarily retired. Similarly, *Sandia* involved layoff allowances which would not have been received absent job termination. *See Equal Employment Opportunity Comm'n v. Sandia Corp.*, 639 F.2d 600, 626 (10th Cir. 1980). Based upon the foregoing, the Court declines to disturb the jury's award of back pay.

B. Defendant's Motion for New Trial

Most of the contentions in this motion have been addressed by the Court's discussion above. However, a few points remain. First, Defendant claims error exists in the Court's charge. Defendant claims that the plaintiff had to "prove that age was a 'determinative factor' in his discharge." The Court's charge reads:

> To summarize, it is the burden of the Plaintiff to prove to your satisfaction by a preponderance of the evidence that the Defendant discriminated against him *because of his age*. He must prove

> that he has suffered an unfavorable employment action and that his *age was one of the reasons* for that action. *If you find that Plaintiff's age was one of the reasons, then you must determine if Defendant has proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his age.*

See Court's Charge p. 10 (emphasis added). The Court believes that, at the very least, this language can be construed as requiring the jury to find age *a determinative factor.* This language is much stronger than that found too weak in *Loeb. See Loeb,* 600 F.2d at 1019. There, the court had charged the jury that age did not have to be the sole factor, that age need only be one factor that contributed to or affected the defendant's decision, and that age had to have made a difference. *Id.* The cases cited by Defendant do not indicate that age must be the *only* factor. *See Hansard,* 865 F.2d at 1465; *Bohrer v. Hanes Corp.,* 715 F.2d 213, 218 (5th Cir. 1983), *cert. denied,* 465 U.S. 1026 (1984); *see also Loeb,* 600 F.2d at 1019 (age need not be sole motivating factor). Furthermore, the special interrogatories given to the jury resolve any doubt in favor of the Defendant. Interrogatory number two asks: "Do you find that Plaintiff's age was one of the reasons for the Defendant's discharge of the Plaintiff?" The jury answered "Yes." Interrogatory number three then inquires: "Do you find that Defendant would have discharged Plaintiff regardless of his age?" The jury responded "No." Therefore, age could have been nothing less than a determinative factor according to the jury. The jury plainly found that Plaintiff was discharged "because of his age."

Defendant contends that the Court did not give a complete charge on the issue of constructive discharge. Defendant claims the Court did not charge the jury that "Defendant deliberately made the Plaintiff's working conditions so intolerable that the Plaintiff was forced into an involuntary resignation." Stated simply, this is not required. *See Jurgens v. Equal Employment Opportunity Comm'n*, 903 F.2d 386, 390 (5th Cir. 1990); *see also Boze v. Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990). The Court's charge was taken from Fifth Circuit language that comes at the close of a discussion of what the proper standard should be. *See Bourque*, 617 F.2d at 65. The Fifth Circuit states in summary that "the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Id.* (citations omitted). The Court finds no error.

Finally, the Defendant claims it was error not to include an interrogatory asking the jury what amount should be deducted from any back pay award. Defendant did request the following interrogatory: "What amount of income do you find from a preponderance of the evidence that Plaintiff actually received, from any source, since his employment with Defendant ended?" *See* Defendant's Proposed Interrogatories to the Jury p. 6. Likewise, the Defendant requested an interrogatory addressing the issue of mitigation at the charge conference. The proposed interrogatory was to read: "If you find Plaintiff failed to mitigate his damages, what amount of money (including benefits) do you find that Plaintiff could have earned?" Neither of these proposed interrogatories addresses the issue of retirement benefits Plaintiff

received from the Defendant. The former deals with the time period after Plaintiff has been constructively discharged and received his retirement. The latter concerns the same time period, but focuses on Plaintiff's earnings including benefits. The jury was instructed to deduct certain items in mitigation of Plaintiff's back pay award. *See* Court's Instructions To The Jury p. 11. It is obvious that the jury reduced the amount of back pay requested. Accordingly, Defendant's Motion for New Trial will be denied.

C. Defendant's Motion to Alter Judgment

Defendant requests the Court to reconsider its Order requiring the reinstatement of Plaintiff. Reinstatement is the preferred remedy. *See Johnson*, 853 F.2d at 382. However, both parties have expressed a concern regarding future relations.

Defendant states that "[t]here is no longer a Dealer Loan Department at First National Bank of Killeen, and there is no demand for a loan officer or Vice President to perform dealer loan services." Yet, the Plaintiff is entitled to reinstatement to the Dealer Loan Department or a comparable position. Defendant claims that to reinstate Plaintiff in the Consumer Loan Department, a comparable position, would cause the displacement of another employee and that this is improper. *See Walsdorf v. Board of Commissioners*, 857 F.2d 1047, 1054 (5th Cir. 1988). Defendant does not specifically state that no comparable positions are available (i.e. in departments other than Consumer Loans). However, the Court construes this to

be the Defendant's position. If the Plaintiff feels differently, the Court will reconsider any evidence of comparable positions.

Furthermore, Defendant cites a host of other factors opposing the reinstatement of Plaintiff. These factors focus on the general economic situation in the Killeen area. Defendants further indicates and its staff has been reduced and may be reduced further. The Court finds the Defendant's arguments persuasive and will not require reinstatement. Therefore, as Defendant states, an award of front pay is appropriate. *Id.* The Court will permit the parties to file briefs on the issue of front pay.

D. Plaintiff's Motion for Attorney's Fees

The Court will hold this motion in abeyance until the front pay issue has been ruled upon. Accordingly, it is

ORDERED that Defendant's Motion for Judgment Notwithstanding the Verdict is DENIED. It is further

ORDERED that Defendant's Motion for New Trial is **DENIED.** It is further

ORDERED that Defendant's Motion to Alter Judgment is **GRANTED** in that reinstatement will not be required. It is further

ORDERED that Plaintiff's Motion for Attorney's Fees be held in abeyance until the issue of front pay is resolved. The parties are

ORDERED to file briefs on the issue of front pay, including appropriate figures for a front pay award, within twenty (20) days of the filing of this Order.

SIGNED this 27th day of September, 1991.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B. DAVIS, Plaintiff, v. THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, Defendant.	§ § § § § § § § §	CIVIL ACTION NO. W-90-CA-034

ORDER

(Filed Dec. 2, 1991)

Came on to be considered the parties' briefs on the issue of front pay. Defendant initially contends that Plaintiff waived the issue of front pay. The Court disagrees.

Plaintiff requested an award of front pay if reinstatement was not feasible in his First Amended Complaint. The jury determined that Defendant constructively discharged Plaintiff due to his age. In light of such a finding, the Court determined that reinstatement was feasible by Order filed January 24, 1991. Defendant, by Motion filed February 5, 1991, requested the Court to stay reinstatement. The Court granted this motion on February 26, 1991. Based upon several factors, the Court granted Defendant's request that the order of reinstatement be set aside. The Court implicitly found that reinstatement was not feasible.

In this type of case, reinstatement is the preferred remedy. *See Johnson v. Chapel Hill Independent School District*, 853 F.2d 375, 382 (5th Cir. 1988). If reinstatement is not feasible, then front pay may be awarded. *See Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir.), *cert. denied*, 110 S.Ct. 129 (1989). Such a determination is to be made by the Court, not the jury. *Id.* at 1470. The purpose of the Age Discrimination in Employment Act ("ADEA") is to make the plaintiff whole. *Id.* at 1469. The remedies afforded by the ADEA are equitable in nature. *See Deloach v. Delchamps, Inc.*, 897 F.2d 815, 824 (5th Cir. 1990). *See also Johnson*, 853 F.2d at 383. As stated, the Court has determined, upon Defendant's motion, that reinstatement is not feasible. Thus, Plaintiff is entitled to front pay.

Defendant's waiver argument is without merit. *See Reneau v. Wayne Griffin & Sons, Inc.*, No. 90-1537 (5th Cir. October 28, 1991) (front pay not requested, nor any evidence presented). Plaintiff sought and was awarded reinstatement. Only after Defendant moved to set reinstatement aside, did front pay become an issue; and an issue which is to be decided by the Court. Given the purposes of the ADEA, the Court finds that it would be wholly inequitable to deprive Plaintiff of an award of front pay. *See Johnson*, 853 F.2d at 382-83.

There is some uncertainty in the Fifth Circuit as to how the amount of front pay should be determined. *Compare Deloach*, 897 F.2d at 823 *with Hansard*, 865 F.2d at 1470. As *Deloach* points out, the Court in *Hansard* held the jury "should determine the amount." *Hansard*, 865 F.2d at 1470. Under the circumstances of this case, the Court has no problem in holding that it must determine the amount

of front pay owed to Plaintiff. *See Deloach*, 897 F.2d at 824; *see also Reneau*, No. 90-1537; *Johnson*, 853 F.2d at 382-83.

The actual determination of a front pay amount is not as easy. The Court is engaging in "intelligent guesswork." *See Sellers v. Delgado College*, 781 F.2d 503, 505 (5th Cir. 1986). Due to its speculative nature, the Court is given wide discretion in determining an award of front pay. *Id.* Plaintiff seeks a front pay award covering a nine (9) year period for salary, profit sharing, health insurance premiums, life insurance, bonuses, and vacation pay. Citing numerous factors, Defendant contends the Court should award no more than one-half (1/2) of Plaintiff's annual salary.

The facts and circumstances of this case complicate the determination of a front pay award further. The banking industry in general is stressed to say the least. Furthermore, it has been established that the Killeen area has recently suffered economic setback. Defendant has stated that Plaintiff's position is no longer in existence and that Defendant has been forced to reduce its staff. The Court also considers Plaintiff's earnings from subsequent employment, or lack thereof, and any interest earnings Plaintiff may have. Additionally, the Court considered Plaintiff's age and health[1] and the admittedly strained relationship of the parties. Based upon these factors and the inherently speculative nature of such a determination, the Court believes a front pay award of three (3) years is justified. *See Reneau*, No. 90-1537.

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[1] The record establishes that Plaintiff had a heart attack before the constructive discharge.

Both parties agree, and the evidence shows, that Plaintiff's salary was approximately $40,000.00 per year. As to Plaintiff's possible bonuses, Plaintiff testified that the last bonus he received was $1,000.00 in 1986. However, the record also reflects that bonuses were awarded based upon the bank's ability to pay and individual performance. There is no evidence as to the bank's ability to pay. Such an award would be improper. Plaintiff also seeks to recover health and life insurance benefits. The bank paid for Mr. Davis' health and life insurance; however, Mr. Davis paid for his wife's health insurance. The Court believes Plaintiff should recover the insurance benefits *he* would have received had he remained employed by Defendant. An award of the difference between what Plaintiff paid the Bank for his *wife's* coverage and what he now pays for similar coverage is not justified. Finally, Plaintiff is also entitled to three (3) years of participation in profit sharing. Based upon the foregoing discussion, and the evidence and arguments of counsel, a front pay award of $140,000.00 is in order. Taking present value into account, the award would be $131,880.00.[2]

The parties have stipulated that Plaintiff's attorneys fees should be equal to one-third (1/3) of the judgment. The Court will not make an upward adjustment as requested by the Plaintiff. Attorney's fees in the amount

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[2] There is absolutely no evidence as to present value before the Court. Plaintiff suggests 2%. On the other hand, Defendant would use 8-10%. The Fifth Circuit has held that a rate between -1.5% and 3% should govern "federal damage awards for future lost earnings." *See Culver v. Slater Boat Co.*, 722 F.2d 114, 122-23 (5th Cir. 1983). The Court will use a 2% rate over three years.

of one-third (1/3) of the judgment are awarded. Accordingly, it is

ORDERED that Plaintiff recover $131,880.00 in front pay. The Court has previously ordered that Plaintiff recover $75,000.00 in back pay and pre-judgment interest pursuant to its Order filed January 24, 1991. It is further

ORDERED that Plaintiff recover attorney's fees equal to one-third (1/3) of Plaintiff's recovery, and costs of Court. It is further

ORDERED that this case is DISMISSED.

SIGNED this 2nd day of December, 1991.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B. DAVIS, Plaintiff, v. THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, Defendant.	§ § § § § § § § §	CIVIL ACTION NO. W-90-CA-034

JUDGMENT

(Filed Dec. 2, 1991)

In accordance with the Court's Order and the jury's verdict it is

ORDERED, ADJUDGED AND DECREED that Plaintiff recover $75,000.00 in back pay. It is further

ORDERED, ADJUDGED AND DECREED that Plaintiff recover $131,880.00 in front pay. It is further

ORDERED, ADJUDGED AND DECREED that Plaintiff recover prejudgment interest at the rate of 10% per annum until paid. It is further

ORDERED, ADJUDGED AND DECREED that Plaintiff recover attorney's fees equaling one-third (1/3) of the judgment plus costs of court. It is further

ORDERED, ADJUDGED AND DECREED that this judgment bear interest at the legal rate per annum until paid.

SIGNED this 2nd day of December, 1991.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8666

JAMES B. DAVIS,

Plaintiff-Appellee,
Cross-Appellant,

versus

THE FIRST NATIONAL BANK OF
KILLEEN, TEXAS,

Defendant-Appellant,
Cross-Appellee.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 11-09-92, 5 Cir., 199_, ___ F.2d ___)

(January 5, 1993)

Before POLITZ, Chief Judge, WISDOM, and WIENER, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled

on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Wiener
United States Circuit Judge

CLERKS NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

REHG-6

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8666

D.C. Docket No. W 90 CA 34

JAMES B. DAVIS,

Plaintiff-Appellee,
Cross-Appellant,

versus

THE FIRST NATIONAL BANK OF KILLEEN, TEXAS,

Defendant-Appellant,
Cross-Appellee.

(Filed November 9, 1992)

Appeal from the United States District Court
for the Western District of Texas

Before POLITZ, Chief Judge, WISDOM and WIENER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed and a take nothing judgment is rendered against Davis, dismissing

all remaining issues of the Bank's appeal and Davis's cross-appeal.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

November 9, 1992

ISSUED AS MANDATE: February 2, 1993

A true copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Nancy F. Dolly
Deputy
February 2, 1993
New Orleans, Louisiana

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B. DAVIS, PLAINTIFF	) ( ) ( ) (	CIVIL ACTION NO.: W-90CA034
VS.	) ( ) (	
THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, DEFENDANT	) ( ) ( ) ( ) (	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO SET ASIDE JURY VERDICT

(Filed Jan. 17, 1991)

COMES NOW J. B. DAVIS and pursuant to the Court's request makes and files this, his Response to Defendant's Motion to Set Aside Jury Verdict and respectfully shows the following:

I

The Court in considering a motion for Judgment NOV looks at all of the evidence, but does so in light and with all reasonable inferences most favorable to the party opposed to the motion. *Boeing Co. vs. Shipman*, 411 F.2d 365 (5th Cir, 1969). In *Boeing*, the Court there stated:

> " . . . On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair minded men in the exercise of

> impartial judgment might reach differing conclusions, the motions should be denied, and the case submitted to the jury . . . There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences and determine the credibility of the witness." 411 F.2d, at 375.

If the jury could fairly conclude from all of the evidence, albeit disputed, that the bank had discriminated against Davis on the basis of his age and done so willfully, as that term is defined in the charge, then the Motion for Judgment NOV does not stand and is to be overruled.

The Defendant in this regard blindly and without adequate support states that " . . . it is obvious that the jury's verdict in favor of Plaintiff is not supported by substantial evidence." (Memorandum p. 3). Defendant then states, although six good and competent jurors unanimously found otherwise, "The jury's inference (conclusion) that age was a factor in Defendant's action is not a reasonable inference properly drawn from the evidence in this case." Stated another way, since the jury did not believe the Defendant, the jury had to be composed of unreasonable people. The argument propounded by the Defendant wholly disregards all of the evidence and attempts to focus attention to "rehashing" its arguments to the jury at trial. Even more importantly, Defendant's argument here ignores the legal standard of reviewing all evidence in the light and with all reasonable inferences most favorable here to the Plaintiff.

It is a requirement for Defendant to bring a post-verdict motion for judgment NOV, that it first have brought prior to the jury verdict, a motion for directed verdict. Plaintiff's counsel has reviewed his notes from trial and to his best recollection, no motion for directed verdict was made by the Defendant. Therefore, Defendant has waived its entitlement to bring a motion for Judgment NOV. *Rawls vs. Daughters of Charity of St. Vincent DePaul, Inc.*, 491 F.2d 141 (5th Cir. 1974), cert. den. 419 U.S. 1032 (1974).

Assuming that Plaintiff is in error of note and memory regarding Defendant having brought a timely motion for directed verdict, still Defendant's motion for judgment NOV fails. Substantial evidence supports the verdict of this jury. The Plaintiff, Rick Carlisle and Jack Vernon each testified that the new management concept was implemented in such a manner as to make it so difficult for those who had been with the bank for many years that they would quit or retire. Further, the evidence showed that, with particularity to the Plaintiff, he did not fit the "image" of the new management team of young and aggressive officers. On the three occasions new management dealt with Plaintiff which evidenced the Bank's pattern of discriminatory treatment, each was accompanied by age discrimination in fact:

1. When Plaintiff was removed from the policy review task force, the Defendant seized the opportunity to replace Plaintiff with a new employee from the Fort Hood National Bank, one Steve Mills, who was in his 30's, whom the then First National Bank president, Ken Johnson, wanted.

2. When Plaintiff returned to work he was removed from his position of Vice-President of Commercial and Consumer Loans with its status, supervisory requirements and large number of personnel within the department and was moved to the newly created dealer department, a move admitted by Defendant as a demotion. The position which Plaintiff has occupied was against being given to Steve Mills.

3. When Plaintiff had undertaken to perform his duties as head of the Dealer Department, Defendant undertook a scheme to make the conditions of his employment so distasteful that Plaintiff would elect early retirement. In this regard, Defendant failed to advise Plaintiff of the new policies affecting dealer floorplan loans or to assure that Plaintiff knew, understood and had a copy of the new dealer floorplan policies. Moreover, the evidence showed the Bank had determined to remove itself substantially from dealer loans. By placing Plaintiff in the dealer department, Defendant could easily make Plaintiff appear to fail in his performance of duties by finding fault with his efforts on loan accounts the Bank wanted to be rid of anyway. By engaging in this systematic pattern, the Defendant would achieve the reduction of unwanted business and at the same time, eliminate the Plaintiff under the facially valid guise of poor performance or downturn of business.

When Plaintiff was forced to resign he again was replaced by Steve Mills, the same person who replaced Plaintiff on the policy task force and who had taken over as Vice President of Commercial and Consumer loans.

II.

The verdict of the jury that the Defendant acted willfully is supported by substantial evidence.

When Plaintiff was removed as vice president of commercial and consumer loans and moved to the Dealer Department, such move was admitted by Ken Johnson to have been a demotion. He noted that the pay was the same but still it was a demotion. There was nothing in any testimony that Plaintiff had done anything wrong, inappropriate or evidencing anything to justify the demotion. It was simply a matter that the Defendant wanted a younger, more aggressive person in Plaintiff's place. Such unjustified demotion clearly was discriminatory and willful.

Admitted into evidence was the policy manual of the Defendant which clearly stated that the Bank would not discriminate against any employee on the basis of the suspect criteria, including age. Therefore, the personnel charged with implementing that policy are held to a knowledge of it, knowledge of which was admitted by Johnson and Jones.

The Bank through its President, Ken Johnson, and chairman of the Board, Churchill Jones, undertook a scheme designed to eliminate targeted personnel including Plaintiff, by harassing, embarrassing and long and continuous fault finding in the presence of other Bank officers. According to Rick Carlisle, the intent of the Bank was to get those employees, who had been with the Bank under the previous administration, to retire, quit, or otherwise terminate their employment. Over time, this was

brought to fruition as testified by Carlisle and Jack Vernon.

Until the new regime came to the Bank, Plaintiff had never as much received an unsatisfactory rating, much less a reprimand or demand to retire or face probation, the end of which would be termination. As further testified by Rick Carlisle, Plaintiff had been a good employee, but had been subjected to intimidation for not being a "holding company type" person.

In *TWA vs. Thurston*, 469 U.S. 111 (1985) the Supreme Court held that employers acting in good faith and reasonably, albeit unlawfully due to a misapprehension of the ADEA's requirements, would not be liable for liquidated damages. This is not applicable here for the Bank was not operating under any misapprehension of the ADEA or its requirements.

In *Thurston*, the employer sought legal advice concerning its employment policy there in question, and then abandoned its position on those policies which were discriminatory. The Supreme Court determined that employers act reasonably and in good faith when they recognize as did TWA, a potential conflict with the ADEA; seeks legal advice as did TWA; and pursues a policy or practice they reasonably believe to be consistent with the ADEA.

Whitfield vs. City of Knoxville, 756 F.2d 455 (6th Cir. 1985) is another example of good faith with respect to the ADEA. Where the City believed the ADEA could not constitutionally be applied to it and the point had not been at the time definitely decided, it was held that the City had acted in good faith.

In the present case there is no evidence to support its conclusion but for the Bank officers blind statement that there was no discrimination against the Plaintiff on the basis of his age. This is a matter properly within the arena for the jury, and the jury here found the Bank had acted willfully. Clearly, the jury found that there were no reasonable grounds for the Bank to believe its actions would not violate the ADEA.

The question here is what is the actual motive of the Bank, not what it could have been. The jury is entitled to weigh the credibility of the witnesses and disregard as well as disbelieve self-serving testimony, which it has here clearly done.

III.

Plaintiff finds it incredible that the Defendant attempts to convince the Court that the payment to the Plaintiff by the Bank of Plaintiff's vested retirement accumulation is to be used to reduce Plaintiff's back pay award.

To be entitled to offset against back pay any retirement payments must come solely from the employer since such payments are not from a collateral source. *Gutherie vs. J. C. Penney Co., Inc.*, 803 F.2d 202 (5th Cir. 1986). The payments sought by Defendant here to offset back pay were wholly those of the Plaintiff and were not payments from the employer. While the Defendant had during Plaintiff's employment made contributions to Plaintiff's retirement account, those funds wholly belonged to the Plaintiff. These funds are, for purposes

here, the same as any other account in Plaintiff's name at the Bank.

IV.

Plaintiff sought by way of his pleadings reinstatement to his former job position of Vice President of Commercial and Consumer Loans. The statute states " . . . the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter. . . . " 29 U.S.C. Subsection 626(b). This language allows the Court wide discretion in fashioning a remedy for ADEA violations including reinstatement or front pay. Plaintiff testified that he was indeed seeking reinstatement and under the statute reinstatement is the preferred remedy. *EEOC vs. Prudential Federal Savings and Loan Assoc.*, 741 F.2d 1225 (10th Cir. 1984)

Front pay is appropriate in circumstances where reinstatement is not a viable alternative and where such is necessary to return the employee to the economic status he would have enjoyed if not for his discharge and to effectuate the purposes of the Act. *Smith vs. Office of Personnel Management*, 778 F.2d 258 (5th Cir. 1985).

Since reinstatement and, if reinstatement be not ordered, front pay are properly addressable by the Court, no waiver of either remedies occurred by Plaintiff not submitting an issue to the jury for front pay.

V

The burden of proof in mitigation is upon the Defendant. The Defendant asserts that it has proven that Plaintiff did not make a reasonable effort at reemployment and is thereby relieved of the requirement of establishing the availability of substantially equivalent employment. See *Sellers vs. Delgado Community College*, 899 F.2d 1130 (5th Cir. 1985). Defendant, however, has not shown that under the full circumstances and facts of this case any failure of Plaintiff to reasonably seek substantially equivalent employment. However, as related by Plaintiff as well as Ken Johnson, there were no jobs of substantial equivalence in the banking industry in Killeen after Plaintiff's discharge. Indeed, Johnson, after his termination, had to go to far north Texas to locate a new job position for himself.

On cross-examination Defendant inquired if Plaintiff were aware of another former employee of Defendant locating a banking or banking-related job in Copperas Cove, Texas. However, there was no attempt by Defendant to introduce any evidence to establish such position as a substantial equivalent of that discriminatorily taken from Plaintiff or that it was available to Plaintiff had he even known about it. Even if Plaintiff was aware at the time of trial of another former employee of Defendant locating a job in another city, nothing in that knowledge establishes the existence and availability of substantially equivalent employment within Killeen, Texas. The testimony here regarding some third person is no evidence in proof of a failure to mitigate.

For the foregoing reasons, Plaintiff prays the Court deny Defendant's Motion to Set Aside Jury Verdict and that the Court enter judgment in accordance with Plaintiff's Motion for Judgment.

SIGNED this 17 day of January, 1991.

Respectfully submitted,
/s/ Jon R. Ker
JON R. KER, Attorney at Law
State Bar ID#11327700
P.O. Box 1087
Hewitt, TX 76643
Phone: (817) 666-1122
Fax # (817) 666-0903

CERTIFICATE OF SERVICE

I hereby certify on this 17 day of January, 1991, that a true and correct copy of the foregoing Plaintiff's Response to Defendant's Motion to Set Aside Jury Verdict has been forwarded by certified mail, return receipt #P360731783 to Defendant's Attorney, A. J. HARPER, II, 1301 McKinney, Houston, Texas 77010.

/s/ Jon R. Ker
JON R. KER

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B DAVIS, Plaintiff,	§	CIVIL ACTION NO. W-90CA034
v.	§	
THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, Defendant.	§	

DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

COMES NOW First National Bank of Killeen, Defendant herein, and pursuant to Federal Rule of Civil Procedure 50, files this its Motion for Judgment Notwithstanding the Verdict or, in the alternative, pursuant to Federal Rule of Civil Procedure 59, its Motion for New Trial.

PRELIMINARY STATEMENT

This case was tried to a jury on October 24 and 25, 1990. The jury returned a verdict in favor of Plaintiff, finding that Defendant discharged Plaintiff because of his age; that Defendant did not prove this discharge would have occurred absent Plaintiff's age; that Defendant's conduct was willful; and that Plaintiff was entitled to recover $75,000 in damages. On January 24, 1991, the

Court entered judgment for Plaintiff and awarded Plaintiff $75,000 in compensatory damages, and ordered that Plaintiff be reinstated on or before March 1, 1991.

I.

THE GROUNDS FOR ENTERING JUDGMENT NOTWITHSTANDING THE VERDICT[1]

Defendant submits that the Order of Judgment must be set aside and that judgment notwithstanding the verdict should be entered for Defendant on the following grounds:

A. There is no substantial evidence to support the jury's verdict that (1) Plaintiff was discharged; or (2) that age was a factor in Defendant's actions. As the Court held in its Order, Defendant's intent was to place Plaintiff on probation for poor performance, not to discharge him. The evidence is wholly insufficient to satisfy the legal standard for establishing a constructive discharge.

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[1] *See* Defendant's Memorandum of Authorities in Support of its Motion to Set Aside Jury Verdict filed on November 7, 1990, and its Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for New Trial or, in the alternative, Motion for Reconsideration of Order of Judgment filed on January 11, 1991, in this case for the argument and authorities supporting Defendant's contention that judgment n.o.v. is proper, or, in the alternative, that a new trial is warranted. In an effort to minimize the volume of pleadings filed in this case, Defendant is not refiling this Memorandum. With the exception of the argument relating to the jury's finding of willfulness (which has now been overturned by the Court), this Memorandum addresses all issues now before the Court.

B. There is no substantial evidence which supports the jury's verdict of $75,000 in damages to Plaintiff. The undisputed evidence establishes Plaintiff received retirement monies from the Bank in a lump sum and that the amount which represented the Bank's contribution to that sum exceeded Plaintiff's claimed back pay loss.

II.

THE GROUNDS FOR GRANTING DEFENDANT A NEW TRIAL

Defendant submits that, in the alternative, a new trial must be granted on the following grounds:

A. The jury's verdict is against the great weight of the evidence and warrants a new trial because the great weight of the evidence shows:

1. The evidence supporting the jury's conclusion that Plaintiff was constructively discharged because of age is substantively deficient; and

2. The jury's verdict of $75,000 in damages to Plaintiff is contrary to the undisputed evidence in this case and is contrary to this Court's Instructions to the jury.

B. The Court's Instructions and Interrogatories to the jury contained legal error to which objection was made. These errors require that a new trial be granted.

C. Plain error exists in the jury's verdict that Plaintiff was constructively discharged, that age was a factor in this discharge, and in the damages found. Such plain error requires that a new trial be granted to avoid a manifest miscarriage of justice.

D. The Court's conclusion that reinstatement of Plaintiff is not infeasible is against the great weight of the evidence.[2]

III.

THE EVIDENCE

The facts in this case are set forth in Defendant's Memorandum of Authorities in Support of its Motion to Set Aside Jury Verdict filed November 7, 1990, and its Motion for Reconsideration of Order of Judgment, filed January 11, 1991, in conjunction with the issues to which they relate. As discussed in those memoranda, the facts are presented under the standards of *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (*en banc*).

While the standards for the granting of a new trial are less stringent than those for judgment notwithstanding the verdict – *i.e.*, a new trial can be appropriate even if a judgment n.o.v. is not – the evidence, except where otherwise noted, is set forth under the more stringent standard. *See, e.g., Rousseau v. Teledyne Movable Offshore, Inc.*, 812 F.2d 971, 972 (5th Cir. 1987), *cert. denied*, 484 U.S. 827 (1987) ("a verdict can be against the 'great weight of

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[2] For an exhaustive discussion of the reasons reinstatement of Plaintiff is infeasible, see Defendant's Motion for Judgment Notwithstanding the Verdict or, in the alternative, Motion for New Trial, or, in the alternative, Motion for Reconsideration of Order of Judgment and the affidavit attached to that Motion. This Motion was filed on January 11, 1991, following the Court's original entry of Judgment on January 2, 1991. That entry of judgment was set aside by the court on January 15, 1991.

the evidence' even if there is substantial evidence to support it").[3]

WHEREFORE, PREMISES CONSIDERED, Defendant prays that its Motion for Judgment N.O.V. be granted in all respects and that the jury's verdict as to liability and damages be set aside and judgment entered for Defendant. Alternatively, Defendant prays that its Motion for New Trial be granted in all respects.

Respectfully submitted,

FULBRIGHT & JAWORSKI

By /s/ Paula A. Johnson
A. J. Harper II
State Bar No. 09031000

Paula A Johnson
State Bar No. 10778240

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FAX: 713-651-5246

ATTORNEYS FOR
DEFENDANT
FIRST NATIONAL BANK
OF KILLEEN

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[3] Stated differently, the great weight of the evidence shows that, at best, age was an "attenuated possibility." *Pace v. Southern R.R.*, 701 F.2d 1383, 1391 (11th Cir. 1983), *cert. denied*, 104 S.Ct. 549. *See also Stendenbach v. CPC International, Inc.*, 691 F.2d 735, 738 (5th Cir. 1982); *Ford v. General Motors Corp.*, 656 F.2d 117 (5th Cir. 1981).

LOCAL COUNSEL:

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John Palmer, Esq.
NAMAN, HOWELL, SMITH & LEE, P.C.
Post Office Box 1470
Waco, Texas 76703-1470
(817) 755-4100

CERTIFICATE OF SERVICE

I, Paula A. Johnson, one of the attorneys for Defendant herein, do hereby certify that on this the 5th day of February, 1991, a true and correct copy of the foregoing document was served upon Mr. Jon R. Ker, Post Office Box 1087, Hewitt, Texas 76643, by placing same in the United States mail, certified, return receipt requested, postage prepaid.

/s/ Paula A. Johnson
Paula A. Johnson

Fifth Amendment to the United States Constitution.

Amendment V – Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-incrimination; Due Process of law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Seventh Amendment to the United States Constitution:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

§623 Prohibition of Age Discrimination. Employer Practices

(a) It shall be unlawful for an employer –

(1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions,

or privileges or employment, because of such individual's age;

(2) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) To reduce the wage rate of any employee in order to comply with this chapter.

Rule 50, *Federal Rules of Civil Procedure* (As Amended 1987):

> **"Rule 50. Motion for Directed Verdict and for Judgment Notwithstanding the Verdict**
>
> **(a) Motion for Directed Verdict: When Made; Effect.**
>
> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter

vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) **Same: Denial of Motion.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. (Amended August 1, 1987)

Rule 50, Federal Rules of Civil Procedure (As Amended 1991):

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59

may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion for Judgment as a Matter of Law.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve

a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) Same: Denial of Motion for Judgment as a Matter of Law.. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B. DAVIS, Plaintiff, v. THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, Defendant.	§ § § § § § § § §	CIVIL ACTION NO. W-90-CA-034

COURT'S INSTRUCTIONS TO THE JURY

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as

judges of the facts, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A bank is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including banks, stand equal before the law and are to be dealt with as equals in a court of justice.

When a bank is involved, of course, it may act only through natural persons as its agents or employees; and, in general, any agent or employee of a bank may bind the bank by his acts and declarations made while acting within the scope of his authority delegated to him by the bank, or within the scope of his duties as an employee of the bank.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to the witness' testimony. In weighing the testimony of a witness you should consider the relationship of the witness to the Plaintiff or to the Defendant; the witness' interest, if any, in the outcome of the case; the manner of testifying; the opportunity to observe or acquire knowledge concerning the facts about which the witness testified; the witness' candor, fairness and intelligence; and the extent to which the witness has been supported or

contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In order [sic] words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that claim.

In this case the Plaintiff asserts a claim under the Age Discrimination in Employment Act. The Plaintiff alleges that the Defendant discriminated against him by discharging him due to his age.

More specifically, the Plaintiff alleges that while employed by Defendant he was constructively discharged by forced resignation because of his age.

The Defendant denies that it discriminated against Plaintiff because of his age and urges that Plaintiff was not discharged, but that he voluntarily resigned.

Under federal law, it is unlawful for an employer to lay off or otherwise discriminate against any employee because of that employee's age, when the employee's age is over forty.

In order to prevail on his discharge claim, the Plaintiff must prove by a preponderance of the evidence:

1. That he was constructively discharged;

2. That he was within the protected age group, that is over the age of forty;

3. That he was qualified for the position; and

4. That someone younger replaced him, or show otherwise that he was discharged because of his age.

If the Plaintiff has failed to prove one or more of these facts as to his claim, you must find for the Defendant.

The Plaintiff in this case resigned his position. Accordingly, to prove discharge, the Plaintiff must prove that he was constructively discharged. To find constructive discharge, you must be satisfied that Plaintiff's working conditions were so difficult or unpleasant that a reasonable person in Plaintiff's shoes would have felt compelled to resign.

If you find that the Plaintiff has established each of the elements of his claim, you will then consider the Defendant's defense.

Defendant has the burden of producing evidence to rebut the inference of discrimination established by Plaintiff by articulating a legitimate, nondiscriminatory reason for its treatment of the Plaintiff, however, the burden of persuasion always remains with Plaintiff. In this case, the Defendant claims that the action it took was taken because the Plaintiff's job performance was suffering.

It is not unlawful for an employer to discharge a protected individual so long as that discharge is not motivated by age discrimination.

If the Defendant does articulate a non-discriminatory reason for its treatment of Plaintiff, the Plaintiff must then prove that the Defendant's reasons are pretexts for

unlawful discrimination either by showing that a discriminatory reason more likely motivated the Defendant or by showing that the Defendant's reason is unworthy of belief. Whether an employer's stated reasons are pretextual does not depend on whether you approve those reasons. While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is whether the Defendant's given reason was a pretext for illegal discrimination. The Age Discrimination in Employment Act was not intended to allow a party to have a jury review a business decision made by an employer regarding its operation. In other words, the issue is not whether Defendant's decision was reasonable or appropriate, but whether it was motivated by the intention to discriminate.

To summarize, it is the burden of the Plaintiff to prove to your satisfaction by a preponderance of the evidence that the Defendant discriminated against him because of his age. He must prove that he has suffered an unfavorable employment action and that his age was one of the reasons for that action. If you find that Plaintiff's age was one of the reasons, then you must determine if Defendant has proved by a preponderance of the evidence that Plaintiff would have been discharged regardless of his age.

In considering the issue of Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Damages are not allowed as a punishment and cannot be imposed or increased to penalize the Defendant. Neither can damages be based on

speculation because it is only actual damages – what the law calls compensatory damages – that are recoverable.

If you find that the Defendant discriminated against the Plaintiff on the basis of age, then you must determine the amount of damages sustained by the Plaintiff. The Plaintiff is entitled to recover back pay and benefits not received from the date of the violation to the present. You should deduct from this sum any and all amounts received by the Plaintiff as compensation, wages, allowances, unemployment benefits, retirement benefits, and other benefits received during this period. The Plaintiff also has a duty to mitigate his damages. Therefore, if the Defendant proves that the Plaintiff unjustifiably failed to take a new job of like kind, status, and pay which was available to him or failed to make reasonable efforts to find a new job, you should subtract from his damages any amount which he could have earned in a new job after his discharge.

If you find that the Defendant discriminated against the Plaintiff on the basis of age, then you must decide whether Defendant's violation was willful. A violation is willful if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the federal law under which the Plaintiff sues. A violation is willful if it is done voluntarily, deliberately and intentionally and not by accident, inadvertence or ordinary negligence.

You may consider statements made, acts done or omitted and all facts or circumstances which show whether or not Defendant acted intentionally and not by accident. Intentional discrimination is seldom admitted,

and it is not necessary to find direct evidence of intent to discriminate in order to find that the violation was willful.

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe the Plaintiff should, or should not, prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do no hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Upon retiring to the jury room you should first select one of your number to act as your foreperson who will

preside over your deliberations and will be your spokesperson here in court. A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreperson, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B. DAVIS, Plaintiff,	§	
v.	§	CIVIL ACTION
THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, Defendant.	§	NO. W-90-CA-034

****

SPECIAL INTERROGATORIES

****

ANSWER EACH SPECIAL INTERROGATORY
BY A PREPONDERANCE OF THE EVIDENCE

SPECIAL INTERROGATORY NUMBER ONE

Do you find that the Plaintiff was discharged by the Defendant?

Answer: "Yes" or "No."

Answer: Yes

If you have answered "Yes" as to Special Interrogatory Number One, then proceed to Special Interrogatory Number Two.

If you have answered "No" as to Special Interrogatory Number One, then sign and date the verdict form and return it to the Court.

SPECIAL INTERROGATORY NUMBER TWO

Do you find that Plaintiff's age was one of the reasons for the Defendant's discharge of the Plaintiff?

Answer: "Yes" or "No."

Answer: Yes

If you have answered "Yes" as to Special Interrogatory Number Two, then proceed to Special Interrogatory Number Three.

If you have answered "No" as to Special Interrogatory Number Two, then sign and date the verdict form and return it to the Court.

SPECIAL INTERROGATORY NUMBER THREE

Do you find that Defendant would have discharged Plaintiff regardless of his age?

Answer: "Yes" or "No"

Answer: No

If you have answered "No" as to Special Interrogatory Number Three, then answer Special Interrogatories Number Four and Five.

If you have answered "Yes" as to Special Interrogatory Number Three, then sign and date the verdict form and return it to the Court.

SPECIAL INTERROGATORY NUMBER FOUR

Do you find that Defendant's decision to discharge the Plaintiff because of his age was willful?

Answer: "Yes" or "No."

Answer: Yes

SPECIAL INTERROGATORY NUMBER FIVE

What amount do you find will compensate the Plaintiff for his damages?

Answer in Dollars and Cents, or none.

Answer: $75,000

[p. 1] IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

JAMES B. DAVIS, PLAINTIFF	*	CIVIL ACTION NO. W-90-CA-034
VS.	*	
THE FIRST NATIONAL BANK OF KILLEEN, TEXAS, DEFENDANT	*	OCTOBER 25, 1990 WACO, TEXAS

****

BEFORE THE HONORABLE WALTER S. SMITH, JR.,
JUDGE PRESIDING, AND A JURY
EXCERPT PROCEEDINGS

APPEARANCES:

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[p. 2] Court Reporter: Morris W. Bowen
Official Court Reporter
United States District Court
P. O. Box 1908
Waco, Texas 76703

Proceedings recorded by mechanical stenography, transcript provided by notereading.

[p. 3] * * *

OCTOBER 25, 1990 – EXCERPT PROCEEDINGS

* * *

THE COURT: Ladies and Gentlemen, at this point in the trial there are usually legal matters I need to take up, as there are now. It would appear that probably the case is going to be delivered to you for deliberations sometime later this afternoon. We're going to ask you to be in recess till 1:30. We'll be ready to proceed then.

(Jury out.)

THE COURT: Be seated, Folks.

All right, Mr. Harper.

DEFENDANT'S MOTIONS FOR DIRECTED VERDICT

MR. HARPER: To make sure, Your Honor, that the matter is completely disposed of, at this time, we would move for a directed verdict on Plaintiff's alleged demotion claims, on the grounds that it was time-barred, on the further grounds that there is not sufficient evidence that a reasonable person can find that the change in duties of Mr. Davis, without any change of compensation. Change of title, was simply a change in responsibility that did not legally constitute an actual demotion. There's certainly no evidence, not a scintilla of evidence that was based upon his age.

THE COURT: Mr. Ker?

MR. KER: Your Honor, in my discussions with Mr. [p. 4] Harper, – I'll just be up front with the Court – even if the Court does find that it was an actionable demotion, there probably is no damages attributable to that. So, in that regard, that particular issue, and in view of the Court's granting of the Motion in Limine, in all likelihood a directed verdict would be proper for that particular issue.

THE COURT: The motion will be granted.

MR. HARPER: Thank you, Your Honor. Now, we also, at this time, move for a directed verdict as to the remaining claim in this lawsuit relating to the alleged constructive discharge of Mr. Davis by the bank. The evidence in this case is such that there is no support that Mr. Davis was constructively discharged, which is a legal standard under well-established Fifth Circuit precedent. It requires that a reasonable person, in a position, if he

feels compelled by the circumstances, to resign. The evidence in this case comes nowhere close to meeting that threshold legal standard. Mr. Davis was aware of other officers who had been placed on probation. Mr. Davis was aware those other officers had not been terminated. While there may have been some penumbra, if you will, of a concern on the part of the existing bank officers that the holding company was changing standards and that they were not able to meet those standards, that does not create intolerable working conditions sufficient to lead to a constructive discharge when one is told his performance is not [p. 5] satisfactory.

As further grounds for the motion, we would argue that there is not a scintilla of evidence of relevant reasonable probative evidence that Mr. Davis' age played any part in the decision to place him on performance probation. The evidence is, as to pre-existing officers of the bank, those who were the – I think Mr. Vernon used the word "the local guys" – that half of those people were under 40 and about half were over 40, and that the retention rate of the bank, in fact, was that those over 40 were retained to a higher degree than those under 40. There is just no evidence in this case upon which age was a motivating or determining factor in any alleged constructive discharge of Mr. Davis, and at this time we would move for an instructed verdict.

THE COURT: The Court will not grant that motion, at this time, unless, of course, Mr. Ker, you want to agree to that one, too?

MR. KER: No, sir, I won't.

THE COURT: Have you been furnished with a copy of the proposed Charge, Counsel?

MR. HARPER: Yes, Your Honor, we have, but we –

THE COURT: Would you try to take an opportunity to look it over between now and 1:30, and then when we reach that point, we won't have to delay too long before we can hear objections to it.

[p. 6] MR. HARPER: All right.

MR. KER: Thank you, Judge.

THE COURT: See you at 1:30.

(Recess from 11:40 a.m. until 1:40 p.m.)

* * *

[p. 7] THE STATE OF TEXAS)

COUNTY OF McLENNAN)

I, Morris W. Bowen, Certified Shorthand Reporter and Official Court Reporter in and for the United States District Court for the Western District of Texas, do hereby certify that the foregoing pages 1 thru 6 constitute and contain an accurate and complete transcription of Execrpt [sic] Proceedings of my shorthand notes in the above entitiled [sic] and numbered cause on the dates reflected therein, and that such transcript was prepared under my direction and supervision.

I certify that the transcript fees charged and page format used comply with the requirements of this Court and the Judicial Conference of the United States.

TO CERTIFY WHICH, witness my signature set hereto in the City of Waco, County of McLennan, State of Texas, on this the 12th day of March A.D., 1993.

/s/ Morris W. Bowen
Morris W. Bowen, CSR # 107
Official Court Reporter
U. S. District Court
Room 304, P. O. Box 1908
Waco, Texas 76703

Supreme Court, U.S.
FILED
APR 20 1993
OFFICE OF THE CLERK

No. 92-1524

In The

Supreme Court of the United States

October Term, 1992

JAMES B. DAVIS,

Petitioner,

v.

THE FIRST NATIONAL BANK OF KILLEEN, TEXAS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a party waives its right to challenge the sufficiency of the evidence by its technical noncompliance with Rule 50(b) of the Federal Rules of Civil Procedure if the purposes of the Rule have been satisfied.

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STATEMENT OF THE CASE

Petitioner James B. Davis brought this case against the First National Bank of Killeen, Texas ("the Bank") for alleged violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"). The case was tried before a jury and the Honorable Walter S. Smith, Jr. of the United States District Court, Western District of Texas, Waco Division, on October 25 and 26, 1990. At the conclusion of Petitioner's case-in-chief, the Bank made two motions for directed verdict (App. 82).[1] The first motion challenged the timeliness of Petitioner's demotion claim and was granted by the district court (App. 84). The second motion challenged *both* Petitioner's failure to establish constructive discharge *and* his lack of evidence establishing that he was the victim of age discrimination (App. 85). At the conclusion of all the evidence, the jury returned a verdict in favor of Petitioner and concluded that the Bank had willfully violated the ADEA (Tr. 420).

After considering each party's post-judgment motions, the trial court granted in part the Bank's Motion for Judgment Notwithstanding the Verdict and overturned the jury's finding of willfulness (R. 453-456). On December 2, 1991, final judgment was entered in this case awarding Petitioner $75,000 in back pay, $131,800 in front pay (representing four years salary), prejudgment interest at the rate of 10% and attorney's fees equalling one-third of the judgment (App. 35).

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[1] "App." refers to the Appendix to Davis' Petition for Writ of Certiorari, "Tr." refers to the trial transcript and "R" designates the record on appeal.

The Bank timely appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit. On November 9, 1992, the Fifth Circuit reversed the jury verdict in favor of Petitioner and rendered judgment in favor of the Bank (App. 1). Although the Fifth Circuit acknowledged that the Bank had not technically complied with Rule 50(b) of the Federal Rules of Civil Procedure, the court proceeded to review the sufficiency of Petitioner's evidence proving age discrimination. Specifically, the court acknowledged that Judge Smith denied "at this time" the Bank's motion for directed verdict concerning Petitioner's evidence of age discrimination (App. 10). The court also recognized that the Bank called only one short witness in its case-in-chief (App. 10). Petitioner was then recalled to briefly summarize his previous testimony in rebuttal, and only a few minutes elapsed between the Bank's motion for directed verdict and the close of the evidence (App. 10). As a result, the Fifth Circuit properly concluded that the purpose of Rule 50(b) had been satisfied at the trial of this matter, and therefore the Bank did not waive its right to challenge the sufficiency of Petitioner's evidence proving age discrimination (App. 10). Finding that the record contained a total "dearth" of evidence providing any nexus between Petitioner's age and his resignation, the Fifth Circuit reversed the jury's verdict in Petitioner's favor and rendered judgment for the Bank (App. 16).

As the Fifth Circuit correctly found, the Bank did not waive its right to challenge the sufficiency of Davis' evidence of age discrimination. Davis produced no evidence connecting his resignation with his age, the Fifth

Circuit's judgment is correct and the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

Pursuant to the rules of this Court, a petition for writ of certiorari should be granted in only the rarest of circumstances. Basically, Rule 10 of this Court's Rules provides that the decision of a federal appellate court will be reviewed when the decision either 1) conflicts with the decisions of other courts of appeals or with this Court on the same matter; or, 2) an appellate court has so far departed from the accepted and usual course of judicial proceedings that this Court's supervision is required.

In this case, the Fifth Circuit correctly found that the Bank did not waive its right to challenge the sufficiency of Davis' evidence by its technical noncompliance with Rule 50(b) of the Federal Rules of Civil Procedure. The Fifth Circuit also correctly determined that Davis produced "at most the proverbial scintilla" of evidence connecting his age with his resignation (App. 14). Because the Fifth Circuit's decision in this case follows well-established decisions of the other circuit courts, Davis' Petition for Writ of Certiorari should be denied.

A. There Is No Conflict In Circuit Court Decisions

Rule 50(b) of the Fed. R. Civ. Proc. requires that a motion for directed verdict be made at the close of all the evidence. Federal courts have interpreted this Rule to mean that a party who fails to renew a motion for

directed verdict at the close of all the evidence, absent special circumstances, waives its right to move for a judgment n.o.v. *Bohrer v. Hanes Corp.*, 715 F.2d 213, 216 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984). As indicated by these same decisions, courts do not require strict application of the Rule, as long as the purposes of the Rule are served. Instead, the application of Rule 50(b) in any case "should be examined in the light of the accomplishment of [its] particular purpose[s] as well as in the general context of securing a fair trial for all concerned in the quest for truth." *Id.* at 217; *Miller v. Rowan Companies, Inc.*, 815 F.2d 1021 (5th Cir. 1987).[2]

One of the primary purposes of Rule 50(b) is to provide the opposing party with notice of any claimed evidentiary defects so that he or she can attempt to cure those defects before the case is submitted to the jury. *Merwine v. Board of Trustees for State Institutions*, 754 F.2d 631 (5th Cir.), *cert. denied*, 474 U.S. 823 (1985); *Ohio-Sealy Mattress Mfg. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). In determining whether the purposes of the Rule have been served, circuit courts review the evidence and course of proceedings in the trial court to determine whether the party opposing the motion for judgment n.o.v. was prejudiced by the failure of the moving party to request a directed verdict at the close of the evidence. *McKinnon v. City of Berwyn*, 750 F.2d 1383 (7th Cir. 1984); *Best Brands Beverage v. Falstaff Brewing Corp.*, 842 F.2d 578, 587 (2nd Cir. 1987).

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[2] No circuit court disagrees with this proposition.

For example, in *McKinnon*, the court held that a defendant's failure to move for directed verdict at the close of the evidence after having moved for directed verdict at the close of the plaintiff's case did not bar its motion for judgment n.o.v. because the plaintiff suffered no prejudice. In reaching this conclusion, the court stated,

> If none of the evidence put in as part of the defendant's case weakens the defendant's motion for directed verdict, the plaintiff cannot argue that he thought that the defendant, by not renewing the motion, had abandoned it because its evidentiary foundations had been weakened, and thinking this had therefore not put in rebuttal evidence that might have repaired the evidentiary deficiencies exposed by the initial motion.

McKinnon, supra, 750 F.2d at 1390. The inherent logic of this approach was succinctly reiterated by the Second Circuit:

> The point is that a party opposing a motion for judgment n.o.v. suffers no prejudice from its adversary's failure to renew a motion for directed verdict at the close of the evidence where the party could *not* reasonably have thought, based on its adversary's defense case, that the adversary no longer thought there was an insufficiency of evidence. Such a thought could *not* be reasonably entertained where the adversary's evidence, . . . , only strengthened its own case and did nothing to strengthen the case of the party opposing the motion for judgment n.o.v. [emphasis in original].

Best Brands Beverage, supra, 842 F.2d at 598 n.3.

Rather than the exception, it is the rule that a party's failure to renew a motion for directed verdict at the close of all the evidence will not foreclose a challenge to the sufficiency of the evidence "if the evidence introduced after the motion for directed verdict was brief, and the court somehow indicated that renewal of the motion would not be necessary." *Riverview Investments v. Ottaway Community Imp.*, 899 F.2d 474, 477 (6th Cir.), *cert. denied*, 111 S.Ct. 151 (1990); *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285, 294 (8th Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *Ohio-Sealy, supra*, 585 F.2d at 825-26; *Best Brands, supra*, 842 F.2d at 587. As demonstrated by these decisions, a contrary rule would amount to "slavish application" of Rule 50(b) and would require federal courts "to succumb to a nominalism and a rigid trial scenario as equally at variance as ambush with the spirit of our rules." *Id.*; *Riverview, supra*, 899 F.2d at 477; *see also Bohrer, supra*, at 216; *McKinnon, supra*, at 1390; *Halsell, supra*.

As in the above cases where noncompliance with Rule 50(b) was excused, the purposes of the rule were very clearly satisfied in the present case. Petitioner cannot argue that he suffered any prejudice as a result of the Bank's failure to move for directed verdict at the close of the evidence.[3] After the close of Petitioner's case-in-chief, the Bank called only one witness to briefly testify. That witness, Churchill Jones, weakened Petitioner's case in a number of material and significant ways, including testimony concerning the types of deficiencies in Petitioner's

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[3] Petitioner's contention that the Bank's motion for directed verdict did not address age discrimination is meritless. *See* App. 85.

work performance and testimony as to the hiring practices of the new management (which reflected no age bias). Petitioner attempted to cure the obvious defects in his proof by recalling Davis to briefly reiterate his conclusory assertions that he was constructively discharged and discriminated against on the basis of age. Petitioner offered no new evidence in his rebuttal testimony to substantiate these claims, and his testimony was merely cumulative.

In addition, the Fifth Circuit recognized in this case that the trial judge denied the Bank's motion for directed verdict "at this time" (App. 10). Based upon the judge's pronouncement, the Bank could reasonably assume that the judge was continuing to consider the motion. Requiring the Bank to articulate the words of a directed verdict at the close of the evidence would surely elevate form over substance and would defeat, rather than promote, the purposes behind Rule 50(b).

As in *Best Brands*, there was "no possibility that [the Bank] misled [Davis] into holding back any rebuttal evidence." *Best Brands, supra*, 842 F.2d at 587. As in *McKinnon*, Petitioner's case was not strengthened by any evidence presented during the Bank's case-in-chief. Instead, this "de minimis lapse equates with the one [the Fifth Circuit] forgave" in previous decisions of that court (App. 10). *See Merwine v. Board of Trustees*, 754 F.2d 631, 635 (5th Cir.), *cert. denied*, 474 U.S. 823 (1985). The primary purpose of Rule 50(b) was accomplished when Davis was put on notice of the claimed deficiencies in his proof by the Bank's earlier motion for directed verdict. Given the Fifth Circuit's recognition of the total "dearth" of evidence establishing age discrimination (App. 16),

Petitioner cannot credibly assert that he was lulled into believing the Bank had abandoned its position that there was insufficient evidence to justify sending the case to the jury, or that he was "surprised" when the Bank raised these issues in post-trial and post-judgment motions. It is thus clear that the Bank did not waive its challenge to the sufficiency of Petitioner's evidence and the Fifth Circuit properly found that his evidence was insufficient to support the jury's verdict.

B. There Was No Departure From The Usual Course Of Proceedings

While Petitioner suggests that there was a "departure from the usual course of proceedings" by the Fifth Circuit, necessitating this Court's discretionary review, this contention is without merit. As noted above, the circuit courts dealing with this issue have consistently found that technical compliance with Rule 50(b) is unnecessary if the purpose of the rule is satisfied. However, as the Fifth Circuit recently made clear, courts do not hesitate to stringently apply Rule 50(b) where the purposes of the rule have *not* been satisfied.

In *McCann v. Texas City Refining, Inc.*, 984 F.2d 667, 672 (5th Cir. 1993), the court acknowledged that it has been "willing to excuse certain 'de minimis' departures from technical compliance with Rule 50(b)" in the past. The court went on to note, however, that

> [i]n each case, the trial court had reserved a ruling on an earlier motion for directed verdict (made at the close of the plaintiff's evidence);

> the defendant called no more than two witnesses before closing; only a few minutes elapsed between the motion for directed verdict and the conclusion of all the evidence; and the plaintiff introduced no rebuttal evidence.

Id. In contrast, the district court in *McCann* flatly denied the motion for directed verdict and the movant introduced numerous witnesses after close of the plaintiff's case, amounting to a full day of testimony. Although the Fifth Circuit, and its sister circuits, have approached questions of technical compliance with a "liberal spirit," the Fifth Circuit has not and has refused to "rewrite the Federal Rules of Civil Procedure." *Id.* at 673. Rather than departing from the normal course of proceedings, the Fifth Circuit in this case fully and properly determined that the purposes of Rule 50(b) had been satisfied, "scoured the record" (App. 14), and reviewed the sufficiency of Petitioner's evidence. Finding "at most the proverbial scintilla," the Court then properly entered judgment for the Bank (App. 14).

CONCLUSION

Although it is axiomatic that this Court does not sit to decide factual issues and reweigh the evidence presented at trial below,[4] Petitioner seeks exactly that remedy. There is no critical question of unique importance

[4] *See e.g. Maine v. Taylor*, 477 U.S. 131, 145 (1986); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

requiring this Court's attention. The circuit court decisions on this issue are in harmony, not conflict. Nor has there been any "departure" from the usual course of proceedings. Consequently, the Petition for Writ of Certiorari to the Fifth Circuit in this case should be denied.

Respectfully submitted

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